

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 92

BOLAND CAMARA, APPELLANT,

vs.

**MUNICIPAL COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO.**

**APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA,
FIRST APPELLATE DISTRICT**

FILED MARCH 22, 1967

PREVIOUS ASSIGNMENT NOTED OCTOBER 14, 1966

SUPREME COURT OF THE UNITED STATES

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[fol. A]

**DISTRICT COURT OF APPEAL OF THE STATE OF
CALIFORNIA, THE FIRST APPELLATE DISTRICT**

ROLAND CAMARA, Plaintiff,

VS.

**THE MUNICIPAL COURT OF THE CITY AND COUNTY OF
SAN FRANCISCO, Defendant.**

Clerk's Transcript

**On Appeal from Judgment of the Superior Court of the
State of California, in and for the City and County of
San Francisco, Honorable Joseph Karesh, Judge.**

[fol. 3]

**IN THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE
CITY AND COUNTY OF SAN FRANCISCO**

PETITION FOR WRIT OF PROHIBITION—

Filed February 21, 1964

**To the Honorable Judges of the Superior Court of the
City and County of San Francisco:**

**The undersigned petitioner petitions this Honorable
Court for the issuance of a writ of prohibition directed to
the respondent above named, and, as grounds therefor,
alleges:**

I

**Petitioner is a resident of the City and County of San
Francisco and resides, and at all times herein pertinent
resided, at 223 Jones Street in that city. Petitioner's resi-
dence is one of sixteen apartments in said building.**

II

On or about November 6, 1963, petitioner at his residence was visited by William Nall, Food and Environmental Health Inspector for the Department of Public Health of the City and County of San Francisco. Nall asked petitioner for permission to inspect his apartment. Petitioner asked Nall if he had a warrant authorizing his admission or any complaint showing any reason for the inspection. Nall stated that he had no warrant nor had there been any complaint concerning petitioner's apartment but that the law allowed him to make an inspection without a warrant and without a complaint as to the premises to be inspected. [fol. 4] Petitioner declined to allow Nall entrance to his apartment and the apartment was not inspected by Nall.

III

On or about November 22, 1963, petitioner at his residence was visited by John M. Reid, Principal and Environmental Health Inspector, Department of Public Health, City and County of San Francisco, and William Nall. Reid asked petitioner's permission to make an inspection of his apartment and stated that they had no warrant or complaint, and that said inspection was a part of the "routine" inspection program of the Department of Public Health. Petitioner again declined to give his permission for an inspection of his apartment and no inspection was made.

IV

On or about December 2, 1963, petitioner was arrested by officers of the San Francisco Police Department on the charge of violating section 507 of the San Francisco Municipal Housing Code. Petitioner was booked and incarcerated in San Francisco City Prison. On the same day petitioner was released from jail on the posting of \$110 cash bail.

V

On or about December 10, 1963, a complaint was filed in respondent Municipal Court under the number H 72647 charging petitioner with a misdemeanor in that he violated section 507 of the Municipal Housing Code by opposing the execution of section 503 of the Municipal Housing Code. [fol. 5] Said complaint was signed and sworn to by William Nall and charged that the offense was committed on or about November 22, 1963. A true copy of said complaint is attached to this petition as "Exhibit A" and incorporated herein as if set out here in full. Copies of sections 503 and 507 of the Municipal Housing Code are attached hereto as "Exhibit B."

VI

On or about December 17, 1963, petitioner, by his counsel, filed a demurrer to said complaint in respondent court. Said demurrer alleged the complaint did not state facts sufficient to constitute a public offense because section 503 of the Municipal Housing Code is unconstitutional and void as in conflict with Article I, sections 1 and 19 of the Constitution of the State of California and the 14th Amendment to the Constitution of the United States. A true copy of said demurrer is attached to this petition as "Exhibit C" and incorporated herein as if here set out in full.

VII

On or about December 27, 1963, said demurrer was argued before the Honorable Elton Lawless, a judge of respondent Municipal Court, and submitted for a decision. On the same date said demurrer was overruled by Judge Lawless and petitioner required to enter his plea to the charge of the complaint.

VIII

On December 27, 1963, petitioner entered a plea of "not [fol. 6] guilty" to the charge of violating section 507 of the Municipal Housing Code and demanded a jury trial.

IX

Section 503 of the Municipal Housing Code is unconstitutional on its face as authorizing an invasion by government officials of a private residence without warrant and without any showing of probable cause.

X

The respondent Municipal Court is without jurisdiction to proceed to try petitioner under the complaint referred to in paragraph V, above, for the reasons stated in paragraph IX, above. Nevertheless respondent threatens to proceed with said trial and will proceed with said trial unless restrained by this court.

XI

Petitioner has no plain, speedy or adequate remedy at law to protect him from said trial and therefore prays that this Court do as follows:

1. Issue its order requiring respondent Municipal Court to sustain the demurrer and dismiss Complaint No. H 72647 or, in the alternative, show cause before this Court at a time and place to be fixed why it should not be forever restrained and prohibited from proceeding with the trial of Complaint H 72647, or taking any action therein except to dismiss said complaint.

2. For such other and further relief as may seem just [fol. 7] and proper in the premises and for costs of this suit.

Marshall W. Krause, Attorney for Petitioner.

Duly sworn to by Roland Camara, jurat omitted in printing.

EXHIBIT A TO PETITION

Action No.	Defendants	Violation	11. Dept.
H 72647	ROLAND CAMARA	507 Mun. Hsg. Code	12

THE PEOPLE OF THE STATE OF CALIFORNIA vs.
THE DEFENDANT/S ABOVE NAMED

IN THE MUNICIPAL COURT IN THE
CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

Filed

**Clerk of the
Municipal Court**

By _____
Deputy Clerk

COMPLAINT

State of California)
) ss.

CITY AND COUNTY OF SAN FRANCISCO)

[fol. 8] WILLIAM NALL being duly sworn deposes and says on information and belief that the said defendant did in the City and County of San Francisco, State of California, on or about the 22d day of November, A.D. 1963, commit the crime of MISDEMEANOR to-wit: Violating Section 507 of the Municipal Housing Code in that said defendant, the owner, lessee and authorized agent, did neglect, refuse, resist and oppose the execution of Section 503 of the Municipal Housing Code to wit, allow authorized public health inspectors in the performance of their duties and the presentation of proper credentials to enter at a reasonable time a building structure or premises in this city, to perform their duly imposed duty.

/s/ WILLIAM NALL
Address: Dept. Public Health
Telephone 401 Grove St.
UN 1 4701

Subscribed and sworn to before me on
November 26, 1963

Walter Varakin
Deputy District Attorney,
City and County of San Francisco,
State of California.
Stat.

EXHIBIT B TO PETITION

Sec. 503 RIGHT TO ENTER BUILDING. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, [fol. 9] at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code. (see Article 18.)

Sec. 507 PENALTY FOR VIOLATION. Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue. Any person who shall do any work in violation of any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of

Public Health made pursuant to this Code, and any person having charge of such work who shall permit it to be done, shall be liable to the penalty provided. (See Article 18.)

[fol. 10]

EXHIBIT C TO PETITION

MARSHALL W. KRAUSE
Staff Counsel
American Civil Liberties Union
of Northern California
503 Market Street
San Francisco 5, California
EXbrook 2-4692

/ Attorney for Defendant

IN THE MUNICIPAL COURT OF THE CITY AND COUNTY OF
SAN FRANCISCO, STATE OF CALIFORNIA

H 72647—Dept 12

PEOPLE OF THE STATE OF CALIFORNIA,

v.

ROLAND CAMARA, Defendant.

DEMURRER TO COMPLAINT

Comes now the defendant above-named and demurrers to the complaint filed against him in the above case on the following ground and supported by the attached Points and Authorities.

Said complaint does not state facts constituting a public offense in that the section of the Municipal Housing Code which defendant is alleged to have resisted, to wit: Section 503, is unconstitutional and thus null, void and of no effect.

It follows that the complaint on its face does not allege a violation of Municipal Housing Code Section 507.

DATE: December 16, 1963

M W K
MARSHALL W. KRAUSE
ATTORNEY FOR DEFENDANT

[fol. 11]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

I

Prohibition Is the Appropriate Remedy

When a Court has acted or threatens to act in excess of its jurisdiction prohibition is the appropriate method to restrain further action.

C.C.P. §1102.

Where an ordinance or statute is claimed to be unconstitutional, prohibition is the proper remedy where the trial court asserts its continuing jurisdiction after a challenge to the ordinance or statute calling the attention of the Court to the alleged constitutional defect.

Whitney v. Municipal Court, 58 Cal.2d 907, 911 (1962).

Kelly v. Municipal Court, 160 C.A.2d 38.

A demurrer to a criminal complaint on the basis that the statute the defendant is charged with violating is unconstitutional is a sufficient challenge to the jurisdiction of the court so that prohibition will lie.

Moore v. Municipal Court, 170 C.A.2d 548, 552 (1959).

A requirement that a defendant in a criminal case stand trial in a court which acts without or in excess of its jurisdiction would be an imposition of personal hardship upon [fol. 12] the defendant and a futile expense to the public. In such cases, the right to appeal from a subsequent judg-

ment is an inadequate remedy and a writ of prohibition will lie.

Moore v. Municipal Court, 170 C.A.2d 548, 552 (1959).

Hunter v. Justices Court, 36 Cal.2d 315 (1950).

Rescue Army v. Municipal Court, 28 Cal.2d 460, 464-465 (1946).

Glasser v. Municipal Court, 27 C.A.2d 455 (1938).

Alves v. Justice Court, 148 C.A.2d 419.

3 Witkin "California Procedure," pp. 2513-2515.

II

The Constitutionality of Section 503

Section 503 of the Municipal Housing Code is unconstitutional on its face since it authorizes a city employee to enter, in the course of his duties, a private home without any showing of emergency, probable cause of a violation of law, or that there is a condition on the premises requiring inspection. Nor is the right granted to the city employee under section 503 conditioned on obtaining a warrant. The statute thus authorizes a violation of the petitioner's constitutional protection against unreasonable search and invasion of the privacy of his home.

The right to be free of an unreasonable search is not limited merely to the exclusion of evidence obtained illegally from criminal trials. A taxpayer may obtain an injunction against the expenditure of public funds for an [fol. 13] unreasonable search. This is the holding of *Wirin v. Horrell*, 85 C.A.2d 497, where a "routine search" of automobiles was found enjoined. The Court held at page 502:

"The reasons for adoption of the Fourth Amendment and Article I, Section 19, of the California Constitution, must be continually borne in mind if we are to preserve the individual liberties of citizens of this country and state. To safeguard the rights and liberties set forth in our Federal and State constitutions, such rights must be strictly enforced, otherwise we will

gradually whittle away our liberties and destroy our form of government with the inevitable result that there will be substituted a despicable form of totalitarianism."

If the right to privacy is interfered with by police officers who enter a hotel room without probable cause and without a warrant, the occupants of the room may obtain damages for the violation of their rights. This is the holding of *Ware v. Dunn*, 80 C.A.2d 936, where the court stated at page 942:

"As a first ground of appeal, it is earnestly asserted that the conduct of appellants (in entering plaintiffs' hotel room without permission) did not violate any of the asserted rights of respondents. With this we cannot agree. The right of people to be secure in their homes against unreasonable searches and seizures is guaranteed by both the Federal and State constitutions [fol. 14] (Const. U.S. 4th Amendment; Cal. Const., Art. 1, Sec. 19). The inviolability of this guarantee cannot be impaired or destroyed under the guise or pretext of "making an investigation," by those clothed with official authority."

The Court in *Ware v. Dunn* went on to state at page 945:

"From time immemorial the most conspicuous feature of history has been the struggle between liberty and authority. Today, as in ages past, we are not without tragic proof that the exacted power of some governments to ignore the inalienable rights of the individual to liberty and to resort to lawless enforcement of the law, is the handmaiden of tyranny. No higher authority, no more solemn responsibility, rests upon the courts than to maintain the constitutional and statutory shields planned and inscribed to preserve liberty under law and to protect each individual from oppression and wrong, from whatever source it may emanate."

The primacy of these principles is well established in California where it is the rule that a search made without a warrant is *prima facie* illegal and the searcher then has the burden of proof to justify it. See *People v. Haven*, 59 A.C. 738, 742. In contrast, Section 503 of the Municipal Housing Code purports to grant to City & County employees the right to search without any justification whatsoever.

[fol. 15] In closing this discussion of general principles, we wish to cite a venerable but virile and enlightening precedent, *Boyd v. United States*, 116 U.S. 616 (1886). The Court there held a federal statute repugnant to the Fourth Amendment and traced the background of that amendment. In summing up the Court stated, at page 630:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the Court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; . . ."

In this case the respondent municipal court has failed to recognize the absolute sanctity and privacy of the home in the absence of some over-riding governmental interest to defeat that sanctity. It has authorized a "routine" search by health inspectors without any showing or allegation of a necessity for that search. Such a practice seems authorized by Section 503, and thus the section itself must be struck [fol. 16] down as unconstitutional.

III

Judicial Decisions on Searches by Health Inspectors

Petitioner has been unable to find any California case involving health inspectors and the right to make "routine" or any other kind of searches. The United States Supreme Court has had two such cases before it, *Frank v. Maryland*, 359 U.S. 360, and *Ohio v. Price*, 364 U.S. 263. In both of these cases, convictions for failure to allow inspection of private premises were affirmed by a sharply divided vote. In *Frank v. Maryland*, the Court split five to four and in *Ohio v. Price*, the conviction was affirmed by an equally divided Court, one Justice not participating. Petitioner takes the position that these cases are distinguishable, and if not distinguishable, erroneous, and if not erroneous, not binding since Petitioner's position is supported by the independent ground of his right to be free of unreasonable searches under the California Constitution.

The statute involved in *Frank v. Maryland*, reads as follows:

"Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the daytime, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of [fol. 17] twenty dollars."

It will be noted that the statute requires cause to be shown to justify a demand for inspection. The San Francisco statute has no such requirement. A second distinction is that the evidence in *Frank v. Maryland* clearly indicated the existence of probable cause to make an inspection. The majority opinion stated (359 U.S. at 366):

"Valid grounds for suspicion of the existence of a nuisance must exist. Certainly the presence of a pile of filth in the backyard combined with a run-down condition of the house, gave adequate grounds for such suspicion."

In our case there was no complaint, or no suspicion of any cause which might require correction, or not be in conformity with the health standards of the City and County of San Francisco.

A third ground for distinguishing the majority opinion in *Frank v. Maryland* is the precedent-shattering decision in *Mapp v. Ohio*, 367 U.S. 643. That case held that the exclusionary rule for evidence seized in violation of the Fourth Amendment was a part of the Fourth Amendment and binding on the States by virtue of the Fourteenth Amendment. The Court stated that the Fourteenth Amendment rights in the area of privacy are strictly parallel to Fourth and Fifth Amendment rights in this respect, as the following quotation illustrates (367 U.S. at 656-657):

[fol. 18] "This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair public trial, including as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. *Rogers v. Richmond*, 365 U.S. 534. * * * We find that as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unreasonable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" (footnote omitted) in their perpetuation of "principles of humanity and civil liberty (secured) . . . only after years of struggle." *Bram v. United States*, 168 US 532, 543, 544 (1897). They express supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." *Feldman v. United States*, 322 U.S. 487, 489, 490."

In contrast to this holding of parallelism between the Fourth and Fourteenth Amendments in the area of privacy,

the majority opinion in *Frank v. Maryland*, (decided two years before *Mapp vs. Ohio*) took a more restricted view of the Fourteenth Amendment. It was there stated by Justice Frankfurter that the historic nub of the Fourth Amendment was protection against search for evidence of criminal [fol. 19] violation and that this concept is the one which is "implicit in ordered liberty," and thus incorporated in the Fourteenth Amendment. Since *Frank v. Maryland* did not involve the search for evidence of criminal violation, the right of privacy of the Fourteenth Amendment was held not to have been invaded by the health officers' demand for entry.

The Frankfurter concept of the Fourteenth Amendment has now been left behind by *Mapp v. Ohio* and it is clear that the whole of the Fourth Amendment protections is binding upon the States. And it is equally clear that the Fourth Amendment's guarantees against unreasonable search and seizure are not limited to searches for evidence of criminal violation. This was established as early as *Ex parte Jackson*, 96 U.S. 727, 24 L. Ed. 877 (1877), where the Court held the Post Office could not open sealed letters without a search warrant.

The decision in *Ohio v. Price*, 364 U.S. 263, need not be discussed since it was affirmed by an equally divided court and accordingly the judgment is without force as precedent. *The Antelope* (U.S.) 10 Wheat 66, 126 L. Ed. 268, 282; *Etting v. Bank of the United States*, (U.S.) 11 Wheat 78, 6 L. Ed. 419, 423.

We wish to close this brief with a citation to *District of Columbia v. Little*, 178 F.2d 13 (1949), which was decided before *Frank v. Maryland* and conflicts with that opinion. In the *Little* case, the situation was much stronger against [fol. 20] the defendant than it is against the petitioner in this case. The evidence showed that a complaint had been made of an accumulation of garbage on the premises to be inspected and the regulation of the District of Columbia under which the inspection was authorized required that probable cause exist. Yet the Court of Appeals for the

District of Columbia refused to uphold the conviction. It stated (178 F.2d 13, 17:)

"To say that a man suspected of crime has a right to protection against search of his home, without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.

"The argument involves a basic error in reasoning in respect to the Constitution's Bill of Rights. The Fourth Amendment did not confer a right upon a people. It was a precautionary statement of a lack of Federal Government power, coupled with a rigidly restricted permission to invade the existing right. The right guaranteed was a right already belonging to the people. The reason for the search-warrant clause was that public interest required that personal privacy be invadable for the detection of crime and the Amendment provided the sole and only permissible process by which the right of privacy could be invaded. To view the Amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true [fol. 21] posture of rights and the limitations thereon.

• • • •

"We emphasize that no matter who the officer is, or what his mission, a government official cannot invade a private home unless (1) a magistrate has authorized him to do so, or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate. This right of privacy is not conditioned upon the objective, the prerogative, or the stature of the intruding officer. His uniform, badge, rank, and the Bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose, or the lowest personal spite."

Petitioner submits the same result is reached under California law.

Respectfully submitted,

Marshall Krause, Attorney for Petitioner.

IN THE SUPERIOR COURT

ORDER GRANTING ALTERNATIVE WRIT—February 21, 1964

On reading the verified petition filed in the above cause, and finding good cause therein,

[fol. 22] ~~It Is Ordered that an alternative writ of prohibition issue out of and under the seal of this Court directed to the above respondent (and commanding it to sustain the demurrer and dismiss the complaint in case No. H 72647,)~~ G.S.L.

Or To Show Cause by written return or answer or otherwise in the courtroom of Department 16 thereof on the 5th day of March, 1964 at the hour of 2 P.M. why ~~it has not~~ the Complaint in G.S.L. ~~done so.~~ Action No. H62646, *People v. Camara*, should not be dismissed.

It Is Further Ordered that a copy of said petition be served with said alternative writ and that copies of the papers served also be served on the real party in interest above named ten days prior to the hearing on the order to show cause.

It Is Further Ordered that said alternative writ command respondent Municipal Court to refrain from setting case No. H72647 for trial or taking any other steps or proceedings in said action until further order of this Court.

Date: February 21, 1964.

Gerald S. Levin, Judge of the Superior Court.

IN THE SUPERIOR COURT

ALTERNATIVE WRIT OF PROHIBITION—February 21, 1964

[fol. 23]

The People of the State of California Send Greetings to
the Above-named Respondent:

Whereas It Manifestly Appears in the verified petition
filed by Roland Camara that you threaten to exceed your
jurisdiction by bringing to trial Action No. H 72647 against
him, and whereas petitioner has no plain, speedy and ade-
quate remedy in the ordinary course of law,

Therefore, we do command you, the said respondent, to
sustain the demurrer to the complaint and dismiss the
complaint in Action No. H 72647 titled *People v. Camara*,

Or, in default thereof, that you show cause by written
return or answer or otherwise before this Court in the
courtroom of Department 16 thereof on the 5th day of
the Complaint in Action No.
March, 1964, at the hour of 2 P.M. why you have not done so.

G.S.L.
H 72647, *People v. Camara*, should not be dismissed.

We Further Command you, the said respondent, to re-
frain from setting case No. H 72647, *People v. Camara*, for
trial or taking any other steps or proceedings in said
action until further order of this Court.

Witness the Honorable *Gerald S. Levin* Judge of the
above Superior Court.

Attest my hand and seal of said Court this 21st day
of February, 1964.

Martin Mongan, Clerk, by F. G. Thomas, Deputy.

[fol. 24]

IN THE SUPERIOR COURT

ANSWER TO PETITION FOR WRIT OF PROHIBITION—

Filed March 4, 1964

Respondent respectfully submits that the only legal issue presented to this Honorable Court for its consideration by the petition is whether or not Section 503 of the San Francisco Municipal Housing Code is unconstitutional on its face, as alleged in paragraph IX of said petition. Respondent urges, therefore, that petitioner's statement of facts set forth in said petition relating to events preceding the petitioner's arrest is obviously irrelevant and immaterial to said issue. However, since petitioner has seen fit to allege the existence of certain factual matters, it would appear that respondent is obliged to answer said allegations, and does so as follows:

I

Answering the allegations of paragraph I, respondent denies that "Petitioner's residence is one of sixteen apartments in said building." The petitioner occupies a portion of the ground floor of a three story apartment building situated at 225 Jones Street in San Francisco. Under the existing permit of occupancy issued by the Department of Public Health of the City and County of San Francisco the entire ground floor of said apartment building is restricted to commercial use and is not authorized for residential occupancy. The permit of occupancy does authorize 16 apartment units in the building but it specifically sets forth that eight of said apartments shall be on the second floor of the building and the other eight shall be on the third floor. It is interesting to note that petitioner admits residing on the premises in question. Clearly said residence is illegal and is not one of sixteen apartments in said building as alleged.

II

Answering the allegations of paragraph II, respondent denies that petitioner asked Inspector Nall on November 6, 1963, if he had any complaint showing any reason for the inspection, or that Inspector Nall stated to petitioner that there had been no complaint concerning petitioner's apartment. Inspector Nall went to the premises on that day to make a routine annual inspection of the premises pursuant to Section 86, Part III of the San Francisco Municipal Code, which provides in part that the Bureau of Housing Inspection of the Department of Public Health shall make an inspection of every apartment house in San Francisco at least once a year for the purpose of licensing said apartment house and issuing a permit of occupancy. Upon his arrival at the premises, Inspector Nall spoke to the manager of the apartment house who informed him that the lessee of the store at 223 Jones Street, on the ground floor of the apartment building, was living in the rear of the [fol. 26] store. Inspector Nall questioned petitioner about his alleged occupancy of the rear of the store as a residence, and the petitioner affirmed that he was in fact living in the rear of the store. Inspector Nall requested permission to enter and inspect the premises, but petitioner refused. Inspector Nall returned to the premises again on November 8, 1963, and requested permission from petitioner to enter and inspect the premises, but petitioner refused.

III

Answering the allegations of paragraph III, respondent denies that Inspector John Reid stated to petitioner on November 22, 1963, that he had no complaint and that the inspection requested was part of the "routine" inspection program of the Department of Public Health. Subsequent to the refusal of petitioner to admit Inspector Nall on November 6 and November 8, a citation was mailed to the petitioner at 223 Jones Street to appear in the District Attorney's office on November 22 to show cause why a war-

rant should not be issued for his arrest for violation of Section 507 of the Municipal Housing Code. Petitioner failed to appear at the scheduled hearing in response to the citation. That afternoon, Inspector Reid and Inspector Nall went to the petitioner's premises at 223 Jones Street and requested permission to enter and inspect the premises. Inspector Reid informed petitioner that it was the legal responsibility of the Health Department to make an inspection of every apartment house in San Francisco once a year to see that it complied with the Municipal Housing Code, and that the occupancy complied with the permit of occupancy issued by the Department of Public Health the previous year. Inspector Reid further informed petitioner that the existing permit of occupancy authorized eight apartment units each on the second and third floors of the building, but that the ground floor was authorized for commercial use only. He also informed petitioner that it was illegal for him to occupy the premises as a residence. He requested permission to enter and inspect the premises, but petitioner refused them permission to enter.

IV

Respondent generally denies the allegations set forth in paragraph IX of said petition. The question of the constitutionality of Section 503 of the Municipal Housing Code is discussed in the attached Memorandum of Points and Authorities.

V

Respondent generally denies the allegations set forth in paragraphs X and XI of the petition, and respectfully requests that the petition be denied.

Dated this 4th day of March, 1964.

Respectfully submitted,

Thomas C. Lynch, District Attorney, By Frank W.
Shaw, Assistant District Attorney.

[fol. 28]

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PETITION FOR WRIT OF PROHIBITION**

A municipality has the power to enact local police, sanitary, and other regulations which are not in conflict with general laws (California Constitution, Art. 11, Sec. 11). Local ordinances must not be unreasonable, arbitrary or discriminatory and must bear a rational relationship to the object sought to be accomplished (*Laurel Hill Cemetery v. City and County of San Francisco*, 152 Cal. 464; 30 S.Ct. 301; *Skaggs v. City of Oakland*, 6 Cal.2d 222).

It is necessary that the means adopted in an ordinance must be reasonably related to the desired end (*In re Matthews*, 191 Cal. 35). In general, the test is whether the ordinance benefits the community's health and welfare, and whether the means selected for this purpose are reasonably necessary to accomplish the desired result without undue oppression of personal rights (*Justensen's Food Stores, Inc. v. Tulare*, 12 Cal.2d 324).

Section 503 of the Housing Code of the City and County of San Francisco provides:

"Right to enter building. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, [fol. 29] upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

There is no doubt that the above section was enacted under the authorized police powers of the city for the purpose of preserving the public health of its inhabitants. In order to accomplish this end it is necessary that health inspectors possess the right to enter a building to determine there exists conditions detrimental to public health.

The Supreme Court of the United States in the case of *Frank v. Maryland*, 359 U.S. 360; 3 L.Ed. 2d 877, upheld the right of a city health inspector to enter premises without a search warrant for the purpose of discovering a nuisance therein. The ordinance in that case provided for entry by the health inspector into any house in the daytime where he has cause to suspect the existence of a nuisance.

The Supreme Court held that the Fourth Amendment guaranteeing individual rights to be free from unreasonable search and seizure was not violated where the search was merely to determine if conditions exist which are violative of local health code regulations. The requested entry was not intended to discover criminal evidence, such as would jeopardize an individual's right under the Fifth Amendment. Rather, the inspection was intended to discover conditions which violate local health laws and where so dis- [fol. 30] covered the owner is directed to remedy the condition. "No evidence for criminal prosecution is sought to be seized."

The Supreme Court in the *Frank* case upholds not only the right to enter premises without a search warrant where there is cause to believe a nuisance exists, but, in addition, authorizes a general area-by-area health inspection without the necessity of a search warrant. The court in its opinion said:

"... Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections

first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned." (359 U.S. 360, 372.)

In the case of *District of Columbia v. Little*, 178 Fed. [fol. 31] 2d 13, the United States Court of Appeals held that a property owner could resist entry of health inspectors without a search warrant for the reason that the Fourth Amendment prohibits unreasonable search and seizure. Judge Holtzoff argues in his dissenting opinion in the *Little* case that the Fourth Amendment is applicable only where the search and seizure is incidental to discovery of evidence in a criminal proceeding or in an action to enforce a penalty and does not apply to inspections where no seizure is intended. Judge Holtzoff also reasons that the personal rights secured by the Bill of Rights are not absolute or unqualified. These rights are subject to reasonable police power regulations. He states at page 968:

"... The personal rights accorded to the individual by the first Ten Amendments are not, however, absolute and unqualified. For example, the right of freedom of speech is limited by the prohibition against publication of obscene material, against incitement to crime, and against the creation of public disorder. Mr. Justice Holmes, in his inimitable manner, observed that in the exercise of the right of freedom of speech, no one may rise in a crowded theater any yell 'Fire!' Similarly, the right of freedom of religion does not permit, in the name of worship, acts that are regarded as illegal, immoral, or offensive. In the same way, the sanctity of the home is not absolute. For example, it [fol. 32] is not disputed that representatives of the local government may enter a home if one of its inhabitants is afflicted with a serious contagious disease that constitutes a menace to the community. Representatives of the Fire Department require no search warrant to enter a house in order to extinguish a blaze,

even if the owner objects to their presence. In many instances, it is proper for public authorities to enter a building to suppress a nuisance, such as a noisy gathering disturbing the peace of the neighborhood. A law enforcement officer may enter a house without a warrant in order to arrest a person who he has reasonable grounds to believe has committed a felony. The law has always recognized that the sanctity of the home is not absolute, but is subject to certain limitations.

"The right of inspection in the interest of public safety and public health is one of these qualifications."

The United States Supreme Court granting certiorari in the *Little* case affirmed the United States Court of Appeals decision without deciding the constitutional question of searches and seizures by health inspectors. The dissent by Mr. Justice Burton, concurred in by Mr. Justice Reed, states:

"In my opinion, also, the duties which the inspector was seeking to perform, under the authority of the District, were of such a reasonable, general, routine accepted and important character, in the protection of [fol. 33] the public health and safety, that they are being performed lawfully without such a search warrant as is required by the Fourth Amendment to protect the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

In the Ohio case of *Eaton v. Price*, 151 N.E.2d 523, the constitutionality of a Dayton ordinance providing for inspection of premises without a search warrant was questioned. The pertinent portion of the ordinance reads as follows:

"The house inspector is hereby authorized and directed to make inspections to determine the condition

of dwellings . . . in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public . . . the house inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units and premises."

It will be noted that the foregoing quoted City of Dayton ordinance does not require reasonable cause for the inspection but merely requires the inspection to be made at a reasonable hour. The ordinance is similar in scope to Section 503 of the San Francisco Housing Code.

The Supreme Court of Ohio in the *Eaton* case held that the Dayton ordinance was constitutional and that the inspection without a search warrant did not constitute an unreasonable search and seizure. The court alludes to the *Little* case, *supra*, and is persuaded by the dissent in that case. The word "unreasonable" search presupposes that a reasonable search is allowable and the court was not ready to conclude that any search without a search warrant would be unreasonable. The prohibition against unreasonable searches does not forbid reasonable searches. (*U. S. v. Rabinowitz*, 339 U.S. 56; 94 L.Ed. 653.)

The court in the *Eaton* case holds, at page 532, that the right of privacy is subject to the general welfare, stating:

"The right of a home owner to the inviolability of his castle should be subordinate to the general health and safety of the community where he lives."

Appellate review of the *Eaton* case was sought in the Supreme Court of the United States, 360 U. S. 246; 3 L.Ed. 2d 1200. The four justices writing the majority opinion in the *Frank* case, *supra*, voted to deny review of the *Eaton* case, in that said case was similar to the *Frank* case, which was controlling on this subject. The *Frank* case had been decided just two weeks prior to the Supreme Court's review of the *Eaton* case. Mr. Justice Stewart, who voted

with the majority in the *Frank* case, did not participate in the hearing since his father then served on the Supreme Court bench in Ohio.

The *Eaton v. Price* case, *supra*, was again before the [fol. 35] Supreme Court one year later (364 U.S. 263; 4 L.Ed. 2d 1708) and the four justices constituting the dissent in the *Frank* case argued that Supreme Court jurisdiction should be allowed in the *Eaton* case because of the sharply divided court (5 to 4) which decided the *Frank* case. Because of such division, they argued that the *Frank* case could not be considered controlling authority. This latest Supreme Court decision in the *Eaton* case affirmed *necessitate* the Ohio Supreme Court.

In the case of *City of St. Louis v. Evans*, 337 S.W.2d 948, the Missouri Supreme Court upheld the right of a building inspector to enter without a search warrant into premises in the performance of his duty between the hours of 9 A.M. and 6 P.M. or at any time necessary in his opinion. The inspection involved in that case was requested pursuant to an owner application for a permit to operate the premises as a rooming house, for which a permit of occupancy was required.

In *Givner v. State*, 124 Atl. 764, the Court of Appeals of Maryland held constitutional an ordinance authorizing certain city inspectors to enter premises without a search warrant at any time during business hours for the purpose of determining whether the structure complied with code regulations. The court, at page 769, quotes from *Cornelius* on Searches and Seizures as follows:

"The constitutional provision in question, while primarily designed to protect the individual in the sanctity of his home and in the privacy of his books, papers and property, does not apply to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals and welfare."

The United States Supreme Court case of *Frank v. Maryland*, *supra*, continues to be authority for the right of a

health inspector to enter premises without a search warrant for the purpose of making an inspection therein. In addition, the *Frank* case authorizes such right during an area-by-area inspection performed in the maintenance of the community's public health. The *Eaton* case, construing an ordinance similar to Section 503 of the San Francisco Housing Code upholds the right to inspection without a search warrant even though no cause is shown to exist. See also *City of St. Louis v. Evans*, supra.

In conclusion it is submitted that the constitutional guaranties provided by the Fourth Amendment against unreasonable searches and seizures do not prohibit a reasonable inspection of premises by authorized city and county agents for the purpose of enforcing and maintaining regulations enacted under the police power for the protection of the public health, safety and welfare of the inhabitants of the City and County of San Francisco.

March 4, 1964.

Respectfully submitted,

[fol. 37] Thomas C. Lynch, By Frank W. Shaw.

IN THE SUPERIOR COURT

ORDER DENYING PETITION—March 21, 1964

The above entitled matter came on regularly to be heard on the 5th day of March, 1964, petitioner, Roland Camara, appearing personally and by his attorney, Marshall Krause, and Frank W. Shaw appearing on behalf of respondent, and the court having heard arguments in support of and in opposition to the petition, the court now finds that Section 503 of the San Francisco Municipal Housing Code is not unconstitutional as alleged in said petition;

It Is Therefore Ordered, that the petition is hereby denied and the alternative writ is hereby dissolved.

Dated: March 19th, 1964.

Joseph Karësh, Judge of the Superior Court.

[fol. 38]

IN THE SUPERIOR COURT

NOTICE OF APPEAL—Filed March 25, 1964

To the Clerk of the Above Court:

Please take notice that the petitioner in the above action appeals to the District Court of Appeal of the State of California, First Appellate District, from the order and judgment of the above Court in favor of respondent and in favor of the real party in interest and denying his petition and dissolving the alternative writ. Said order and judgment was entered on March 19, 1964 at page 6 of Book 108 of the Judgment Book.

Dated March 23, 1964

Marshall W. Krause, Attorney for Petitioner.

IN THE SUPERIOR COURT

NOTICE TO PREPARE TRANSCRIPT AND DESIGNATION OF
RECORD ON APPEAL—Filed March 25, 1964To the Clerk of the Above Court and to the Respondent
and the Real Party in Interest and Their Attorneys:

Please take notice that petitioner in the above case [fol. 39] has appealed to the District Court of Appeal of the State of California, First Appellate District, from the order and judgment entered on March 19, 1964 at page 6 of Volume 108 of the Judgment Book of the above Court.

Please prepare a Reporter's Transcript consisting of all oral proceedings in said action, and a Clerk's Transcript consisting of:

- (1) Petition for Writ of Prohibition;
- (2) Memorandum of Points and Authorities in Support of Petition;

- (3) Order Granting Alternative Writ;
- (4) Alternative Writ of Prohibition;
- (5) Answer to Petition for Writ of Prohibition;
- (6) Memorandum of Points and Authorities in Opposition to Petition;
- (7) Order Denying Petition;
- (8) Notice of Appeal; and
- (9) This Notice.

Dated: March 23, 1964

Marshall W. Krause, Attorney for Petitioner.

[fol. 40] Clerk's Certificate (omitted in printing).

[fol. 41]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

Before: The Honorable Joseph Karesh, Judge.

Department No. 16

No. 540686

ROLAND CAMARA, Petitioner,

vs.

THE MUNICIPAL COURT OF THE CITY AND COUNTY OF
SAN FRANCISCO, Respondent,

PEOPLE OF THE STATE OF CALIFORNIA, Real Party
in Interest.

Reporter's Transcript

APPEARANCES:

For Respondent:

Thomas C. Lynch, District Attorney, 880 Bryant Street,
San Francisco, California, By: Frank W. Shaw, Deputy
District Attorney.

For Petitioner:

Marshall W. Krause, Esq., Staff Counsel, American Civil
Liberties Union, 503 Market Street, San Francisco, Cali-
fornia.

[fol. 42]

Thursday, March 5, 1964, 2:00 P.M.

The Court: Call the case, Mr. Maguire.

The Clerk: Camara vs. Municipal Court.

The Court: State your names for the record, gentlemen.

Mr. Krause: Marshall Krause appearing for the petitioner, Your Honor.

Mr. Shaw: Frank Shaw, District Attorney's office, appearing for the respondent, Your Honor.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: You may be seated.

If the attack, Mr. Krause, is going to be upon the constitutionality of the ordinance, I feel that your petition is overdrawn, you go into factual matters. I think the District Attorney suggested that to the Court, and then he went on to deny some of the allegations that you had asserted in the petition. I think what we are to determine is whether or not this ordinance is unconstitutional, not whether or not the facts in this particular case warrant a going-on with a trial. It may be sufficient in the allegations of the District Attorney that we are not considering the ordinance for them to proceed, but if we are going on the constitutionality of the order, that may or may not be a different thing. You understand what I am trying to say?

Mr. Krause: Yes. I understand it. And I do take the position that it is unconstitutional on its face, and I want to argue that, but also I am concerned with this: On [fol. 43] occasion when a statute is attacked as unconstitutional, the Court will say, well, it might be unconstitutional if it were interpreted the way it seems to read but we will read this and that provision in it and under this reading, it is not unconstitutional on its face. So I am concerned with the possibility that a Court would say, even though this ordinance has no requirement of probable cause before an inspection is made, we will read that in, therefore I think we would be entitled to show, even if that is the way the statute is interpreted, there is no probable cause, and therefore our constitutional attack would therefore be valid.

The Court: No, it would apply with this particular case; you are not concerned alone with this particular case.

Mr. Krause: We are concerned with the broader aspects of it, but my client is faced with a trial also on a criminal charge.

The Court: May I have the file, Mr. Maguire.

I would like to ask the District Attorney a question. Does the ordinance provide that the inspector may, on his own, without any reason, go into a man's premises?

Mr. Shaw: Not just arbitrarily, Your Honor. It provides that: "Authorized employees of the city departments, or city agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the city to perform any [fol. 44] duty imposed upon them by the Municipal Code."

The Court: So that in effect means if they wanted to inspect just to make a spot check they could ring the bell and go in.

Mr. Shaw: At a reasonable time, to ascertain a factual situation which would be within their responsibilities under the code, to determine.

The Court: Well, must it be that they have a suspicion that something is wrong, or can they just conduct a spot check?

Mr. Shaw: Under the wording of this statute, there need be no suspicion, but we do have cases; in fact, the Supreme Court of the United States has ruled upon a case affirming the Supreme Court of the State of Ohio in a similar statute where there was no cause required or suspicion required under the ordinance in question. That was the case of Ohio vs. Price.

The Court: Do you have the ordinance out of Ohio?

Mr. Shaw: Yes, Your Honor.

The Court: What does the ordinance provide?

Mr. Shaw: It provides that the— This is section 806-30a of the Dayton, Ohio code of general ordinances, provides that: "The house inspector is hereby authorized and directed to make inspections to determine the condition of

dwelling, dwelling units, rooming houses, rooming units [fol. 45] and premises located within the city of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public."

"The Court: Isn't that ordinance just like ours, Mr. Krause?

Mr. Krause: I would say it is fairly similar. Commenting on it, I would say that the decision of the United States Supreme Court is not precedent because it was affirmed by an equally divided court, and it is well known that when a judgment is affirmed without an opinion by an equally divided court, it is not precedent. And, as you know, from the Franke vs. Maryland case, the Supreme Court is divided very sharply on this issue, and I don't think we can say Ohio vs. Price is precedent.

Mr. Shaw: Well, that was the position taken by the dissent in the Supreme Court ruling on the Ohio vs. Price case. But the majority, as it were, in that case which was, it is conceded, a four-to-four decision, took the position that they did necessitate affirm this decision because it did not want it misconstrued as to their position in the matter, and in the wording of their decision, they did affirm this particular decision of the Ohio Supreme Court, affirming the conviction of the lower courts, and I feel that here we have the Supreme Court of the United States in the case of Maryland, Franke vs. Maryland in a five-four decision. [fol. 46] The Court: When was that decided?

Mr. Shaw: 1959, Your Honor, the first decision, and several weeks after rendering that decision, although it seems to be—I'm not sure whether it is two weeks or two months, one of the decisions says two weeks, but within a maximum period of two months, the court is again presented with a decision—a factual situation and asked to determine the constitutionality of a statute similar to the one they decided in Franke vs. Maryland.

The Court: In Franke vs. Maryland it says whenever they shall have cause to suspect that a nuisance exists.

Mr. Shaw: Yes, Your Honor, but it further provided in the decision of *Franke vs. Maryland*—

The Court: "... valid grounds for suspicion of the existence of a nuisance must exist."

Then he goes on to say, "Certainly the presence of a pile of filth in the back yard combined with a run-down condition of the house, gave adequate grounds for such suspicion."

Mr. Shaw: Well, that is because, Your Honor, in that particular case the statute in question required that there be suspicion that a nuisance exists, but the Supreme Court of the United States in their decision went on to say that they not only affirm the right of health inspectors to make a specific inspection of premises for a specified purpose, [fol. 47] but they also affirm the right of inspectors to make area-by-area searches, and this clearly indicates the right of the Court or, rather, the right of the inspectors not only to look for a specific nuisance, but to conduct area by area general inspections to determine, for example, if fire hazards or health hazards exist in the premises. Obviously, there are many hazards existing within premises that would not be known to health inspectors or fire inspectors generally, if they did not have the opportunity to go inside and ascertain that for themselves.

In one of the cases it is suggested that warrants could be obtained, search warrants, but obviously the inspectors would have to make a showing of probable cause in order to obtain a warrant, and it would be impossible in the great majority of the cases in the city system of inspection, which is essentially to promote the welfare and well-being, the health of the community would fall by the wayside. I was searching for the specific language of the court in the *Franke* case.

It provides: "... Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search, or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would

be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts [fol. 48] The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago . . ."

Now, this is the language of the majority of the Supreme Court of the United States speaking on this issue. And now, two weeks later, the Ohio statute is presented to them for its consideration, a statute which is almost identical to our San Francisco ordinance, and at this time—it was a very—rather unusual procedure, but it first came before the court in 1959, June 8, and at that time four of the justices who had participated in the majority opinion in the *Franke vs. Maryland* case, voted against noting probable jurisdiction on the basis that the *Franke vs. Maryland* decision was controlling on this point and they used that language in substance.

They also went on to say, well, essentially they voted against noting probable jurisdiction, because they just decided the same point several weeks before. Then the case was not really argued until April 19 of 1960.

Two months thereafter, June 27, 1960, the judgment was affirmed by an equally divided court, and Justice Stewart abstained, did not participate in this decision because his [fol. 49] father is a member of the Ohio Supreme Court, or was, at that time, so that we had a four-four decision, but the four members who had participated in the majority decision in *Franke vs. Maryland* actually affirmed this decision.

Now, apparently, the four members of the U. S. Supreme Court who had comprised the dissenting factor on the *Franke vs. Maryland* case felt they should also have an opportunity to note their position, so on October 10, 1960—excuse me, at that same time Justice Brennan filed a separate dissenting opinion, concurred by Warren, Black and

Douglas, and at that time they did state, as counsel mentioned, that that judgment is without force as precedent, but that is the dissent speaking there, Your Honor, and I believe that we are entitled to rely upon the language of the court that they did in fact affirm the Ohio decision.

The Court: Counsel, in section 503, it provides that, among other things, that "authorized employees of the city departments or city agencies, so far as may be necessary for the performance of their duties, shall," so on, "have the right to enter . . ."

Now, where are the duties of the inspectors listed in the housing code? Do you have their duties?

Mr. Shaw: I have several of them, Your Honor. I did not make notations as to all of them, but I can cite Your Honor to a number of them.

The Court: All right.

[fol. 50] Mr. Shaw: As I pointed out in my answer, if I may allude to the factual situation preceding the defendant's arrest for a moment, the purpose of the inspector in being there was to conduct an annual routine inspection of the premises pursuant to section 86, part 3, of the Municipal Code.

Now this section provides that: "Every person, firm, partnership or corporation maintaining, conducting or operating an apartment house, shall pay an annual license fee as follows, to defray the cost of inspection and regulation by the Division of Housing Inspection of the Department of Public Health, Fire Prevention Bureau, and Bureau of Licenses, and no permits of occupancy shall be issued by the Division of Housing Inspection therefor without said licenses first having been had and obtained."

And then the section goes on to list the various fees that are to be charged for this inspection, and the one that would be pertinent to this particular inspection would be apartment houses of less than twenty rooms, would be an annual license fee of \$12, and this fee is payable on the first day of October of each year.

And the "inspection and regulation shall be made by the Bureau of Housing Inspection of the Department of Public Health and the Fire Prevention Bureau at least once a year and as often thereafter as may be deemed necessary."

[fol. 51] So that here we have an inspector going to the premises to conduct an inspection of the premises pursuant to section 86 of the Municipal Code, part 3. At this point he is unaware that there is an existing violation, in violation of an existing permit, and as pointed out in the answer, the permanent occupancy provided for eight apartment units on the third floor, eight on the second, and none on the first floor, so here was a duty that we were required to perform within the meaning of section 503, it was a duty that was their responsibility to perform under the code within the meaning of 503, and that was their purpose in being there, and they have a right under this section to inspect the premises to see that the premises are being occupied in accordance with the existing permit of occupancy, to see that it hasn't become an overcrowded tenement, and that the sanitation conditions are conducive to the general well-being of the occupants of the apartment house, as well as the community in general. This is a reasonable ordinance, section 86, and I am sure the objective of it is apparent to the Court that it is important that the city inspectors know how many people are occupying a given apartment house so that they won't have overcrowded and congested slum conditions. So it was in pursuance of this ordinance that they went to the premises and then the inspector was informed by the landlady, or rather the manager, that Mr. Camara is in fact occupying the ground floor, at least a portion of the ground floor, as a resident [fol. 52] partially, that he is sleeping in the rear of his store. I would not have gone into this, Your Honor, but counsel has raised the issue, and I feel that it is appropriate that I give some consideration to it in my argument.

The Court: Well, now, let me ask you a question. Suppose that they wanted just to walk up to the door of any residence, anybody's home, can they do it?

Mr. Shaw: Only if they have a legitimate objective spelled out under the Municipal or State codes that governs the responsibilities of whatever inspector or whatever department this individual happened to be.

The Court: They just couldn't make a spot check, could they, just go out to Ingleside Terrace and make a spot check of any home they wanted to without any cause, they couldn't do that, could they? It has to be in performance of their duty.

Mr. Shaw: Well, that is what the ordinance spells out specifically, Your Honor, that it must be in the performance of their duties under the law. Certainly that is a qualification of their rights under this ordinance, so that they could not engage in capricious or arbitrary invasions of individual liberty, which certainly I would also be against, but the people also have some rights to see that various ordinances of the city which are enacted to promote the general welfare of the community are adhered to and followed, and that is the purpose of allowing the inspectors [fol. 53] to go in, to see that, for example, the fire inspector could go in. We had a recent catastrophe several weeks ago where four people were burned in a fire in a home, and there was some question about the construction. Well, as Mr. Krause will point out, they have the right to check those conditions at the time the building is constructed. Well, this is fine for a new building, but what about buildings that are twenty and thirty and forty years old? Should not the city inspectors have the right to make reasonable inspections to see that there are no fire or health hazards? It seems to me to be clearly reasonable, Your Honor, and I think that the ordinance in question is practically on all fours with the ordinance that the Supreme Court at least affirmed by a four-to-four decision—

The Court: Well, counsel concedes that the Ohio ordinance and our ordinance are the same in substance; is that right, Mr. Krause?

Mr. Krause: Yes, Your Honor.

The Court: What you are saying is that the decision should not be precedent, because it was by a four-to-four decision.

Mr. Krause: I think that anyone who is familiar with the Supreme Court practice knows the rule that when a decision is not reached by a majority of the court, it is not precedent and it is affirmed without opinion, and if you look at *Franke vs. Maryland*, the official report says affirmed [fol. 54] by an equally divided court. And I have cited two cases in my memorandum where it has been held that no case where it is affirmed by an equally divided court is precedent or binding. It's true—

The Court: It is extremely persuasive.

Mr. Krause: Well, let's put it this way: This *Franke vs. Maryland*, the earlier case was a bitter division in the court, five to four.

The Court: Who were the justices; you have the volume?

Mr. Krause: Yes.

Mr. Shaw: Yes, Your Honor.

The Court: Who were the justices of the four-four decision?

Mr. Krause: I could tell you that the four in the minority are still there and two of the majority have been replaced by Justices White and Goldberg, who have not expressed themselves on this position, so there are four that believe it is unconstitutional and three that believe that it is not, and two who have not expressed themselves.

The Court: I was always under the opinion that where the Court differs four-four, that while it may not be precedent it is extremely persuasive, and it should take more than a lower court to go against it.

Mr. Krause: Well—

Mr. Shaw: I think, Your Honor, a reading of that particular case which we have here would convince Your Honor that the four justices who have expressed their views in the Ohio case take a very strong position, and, obviously, even if we concede that it is not legal precedent, we have the Supreme Court of the United States refusing to

rule upon this constitutional issue presented because they had just ruled upon the issue two weeks before. Now, obviously, if they didn't think that their *Franke vs. Maryland* decision reached—rendered two weeks before, was controlling, they would have decided the constitutional issues specifically in Ohio—in the Ohio case, and I refer again to the language of the *Franke vs. Maryland* case where the court specifically provides, time and experience have forcibly taught that the power to inspect dwelling places, either as a matter of systematic area by area search, or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health.

Now—

The Court: May I ask you a question?

Mr. Shaw: Surely, Your Honor.

The Court: Has it ever occurred in San Francisco, to your knowledge in the District Attorney's office that the statute is used by the police to get into premises where they can't get a search warrant?

Mr. Shaw: I have never known of such an instance. I am sure if there were one, Mr. Krause of the Civil Liberties [fol. 56] Union would be able to respond to that immediately.

Mr. Krause: I wish we did hear about everything we would like to complain about. Unfortunately, most of these things pass by in the night.

Mr. Shaw: That is pure assumption on his part, Your Honor.

The Court: Is it stipulated as to the facts of this case that are set out in the pleading, or are you in dispute as to any—

Mr. Krause: Your Honor, we have—Mr. Shaw and I have agreed on a few stipulations which can clear up some of the things. If I may state them now, and if we may stipulate for the record, I think—

The Court: I mean, I am frank to tell you, the simplest thing for the Court to do would be to try to decide it on the facts of this case, this particular case, without going

simply on the constitutionality of the section, but I think I would be shirking my responsibility; so far as this case is concerned, counsel, where it involves an apartment house, I am of the opinion that if this ordinance were limited strictly to apartment houses, there wouldn't be any question in my mind but that this particular ordinance is constitutional, they have a right to inspect apartment houses, they grant permits for the running of apartment houses, just like they may inspect hospitals that get their permits or their licenses to operate. What concerns the Court is that [fol. 57] it would give the right to go into anyone's home willy nilly, and that the Court would not approve of, but this section, so far as may be necessary for the performance of their duties, might take care of that particular situation. I am not sure that this would allow you to make a systematic check of neighborhoods, I don't think so, but so far as the facts of this case are concerned in relation to an apartment house, there isn't any question in my mind under this statute that they have a right to do what they do. You have got to draw a distinction between an apartment house and a private dwelling.

Mr. Krause: Let me say that I don't disagree with anything Your Honor has said. I think that any business that has a license, whether it is a liquor store or an apartment house, may be inspected by the licensing authorities. This is not what we are challenging here; we are challenging not the right to come in and ask the owner how many apartments he has, or look at his fire escapes, or look at his kitchen, if he has a public kitchen, such as a restaurant, we are not asking that that be struck down, we think that that is reasonable, we think that it is necessary. What we are seeking to protect is the right of the private apartment dweller.

The Court: But suppose—they have a right, Mr. Krause, to know whether or not these apartments are being used in violation of law, and I have had cases before me now where [fol. 58] —in other matters where private dwellings—apartments, are being used for purposes they should not be used,

and I don't think you can draw a distinction that you are drawing, they certainly have a right, so far as this Court is concerned, I believe, to go into their license, they have a right to go in—up and say, "I want to inspect these premises to be sure that this apartment house is conforming to the law."

Mr. Krause: They could inspect the apartment house, but when it comes to going into a private apartment and inspecting that apartment, it is a little bit different.

Now, let me say in this case, what the situation is: Now, we have talked a little bit about the facts, and I would like to get into this question of what we want to stipulate as the facts. First of all, we want to stipulate that Mr. Camara does live in an apartment on the ground floor in the building known as 225 Jones Street, his particular address happens to be 223 Jones Street, and we also want to stipulate that Mr. Camara is not the owner of this building, he is merely the lessee of the ground floor known as 223 Jones Street, which is part of 225 Jones Street. And these things I think are conceded and will clear up some things.

Mr. Shaw, are you willing to stipulate to those statements?

Mr. Shaw: Mr. Camara is a lessee of a portion of the ground floor of that apartment house and his particular [fol. 59] door is known as 223, whereas the main door to the premises is 225. It might clarify a situation in my brief where I refer to both addresses; it might be confusing.

Mr. Krause: We also, I believe, can stipulate that Mr. Camara informed the building inspectors when they came that he was living on the ground floor. Is that right, Mr. Shaw?

Mr. Shaw: Well—

Mr. Krause: I think you—

Mr. Shaw: —I believe in your petition you set forth as an allegation of fact that he is in fact residing on the premises. It did not specify what portion of the premises, although you referred specifically to an apartment, which

is not the case, he lives in a store on the ground floor, and I would be willing to stipulate to that.

Mr. Krause: And that he informed the inspectors that he did live there.

The Court: Well, you are going into the trial of this case. Remember that came up on a demurrer which was before His Honor, Judge Maloney, and the demurrer was overruled. There weren't any factual questions. So far as the facts of this case are concerned, the only facts I am interested in is that it is an apartment house. And if it is an apartment house, counsel, the Court would pass on the question of whether it is constitutional, a permit being granted, whether it is constitutional to go into all the apartments. [fol. 60] Mr. Krause: Yes.

The Court: And I am of the opinion that they have a right to do that. Now, I would not say that, Mr. Shaw, if we had a private dwelling. You may disagree with the Court but this is a very simple situation. We get a permit to operate an apartment house, and they have a right to inspect.

Mr. Shaw: We have such situations as mother-in-law apartments which Your Honor is aware are illegal. I think the inspectors have the right to inspect private dwellings as well to ascertain not only if such situations exist in violation of the law or that fire hazards or health hazards may exist in a private home, as well, which could not only be a—could be dangerous to the welfare of the occupants, but to the neighborhood, as well.

The Court: Well, I don't have to pass upon that particular situation.

Mr. Shaw: No.

The Court: We are concerned with an apartment house.

Mr. Shaw: May I make just—

Mr. Krause: Let me respond, since Your Honor put me very much on the defensive.

The Court: I had no intention of putting you on the defensive.

Mr. Krause: I feel very much on the defensive, let's put it that way.

The Court: Well, you have a United States court against [fol. 61] you.

Mr. Krause: I don't mind walking uphill, struggling uphill. I want to say this, that Mr. Shaw has been very careful to distinguish this language in section 503, in the performance of their duties, and, as I understand his presentation, he is not saying it requires any showing of cause that there is a violation of any ordinance or statute occurring on the premises, he merely says that if the health inspector is acting in the good faith, that he really wants to inspect to make sure that the kitchen conforms to the building requirements, or some other reason for inspection, and he is not there for the purpose of trying to steal something from the apartment, then Mr. Shaw—

The Court: Or use it as a device to get a law enforcement officer in who can't get a search warrant.

Mr. Krause: Right, this is, of course, one of the things that I am worried about. I am not saying that there is anything of that sort in this case, but I think we are entitled to—

The Court: I am not suggesting that that is being done.

Mr. Krause: Yes. I think we are entitled to look at what this statute could do when we are talking about what a statute means on its face.

Now, Mr. Shaw has said to you, and I have his words down here, quote—in answer to one of your questions, [fol. 62] quote, There need be no suspicion, end quote. That was one of your first questions, and he answered it, No, there need be no suspicion as long as the inspection takes place in reasonable hours, as long as the health inspector is acting in good faith in the performance of his duties. End of quote.

Well, in that situation—

The Court: I won't go that far with you.

Mr. Krause: Well, that's what he said the statute means and that's what I think it means, too, and why I think it

is invalid. If it requires that the health inspector have some cause, then there is a different question about validity.

The Court: I don't think so far as apartment houses are concerned, they need any cause. There is the permit to run an apartment house, and that gives with it the concomitant right to inspect.

Mr. Krause: Yes, to—

The Court: So you may have picked the wrong case—

Mr. Krause: —to inspect—

The Court: —to attack.

Mr. Krause: Your Honor, you are putting the poor apartment dwelling—dweller in a bad position, as far as the Fourth Amendment.

The Court: You conceded that if you have to have a license, they have a right to inspect.

Mr. Krause: But I didn't say that—

[fol. 63] The Court: That as far as I say, they have a right to inspect.

Mr. Krause: If I said that they can inspect private apartments, then I wish to retreat, because I wanted to point out that I think that they can inspect the fire escapes, they can inspect the corridors, they can inspect the public aspects of that apartment, and they can talk to the owner about how many apartments there are, and other considerations, but they can't knock on the door of a private dwelling and insist on coming in, whether it is an apartment or not.

Now, Mr. Camara, it has now been conceded, is not the owner of this dwelling, he does not have the duty or responsibility or the right to even apply for any occupancy permit.

The Court: That is up to the trial court, that is not before me.

Mr. Krause: No.

The Court: You came up on demurrer. There was a demurrer, it was overruled,—

Mr. Krause: Yes.

The Court: —on the fact of its constitutionality.

Mr. Krause: Yes. This ordinance purports to give the inspectors here involved the right to go into Mr. Camara's apartment or any house in the city, Your Honor, without any showing of cause, and that is what is wrong with it.

I want to call to your attention a very recent case which [fol. 64] I just read a few days ago myself, and so I haven't had a chance to call it to the attention of Mr. Shaw. It does not involve inspections, it does involve the constitutionality of an Elections Code provision where the court said that the requirements of this Elections Code provision are very salutary, it does a good job, and we like it, but it goes much too far, it allows too much regulation on inspection material, and the court went on to hold that where a statute is overbroad in its scope, it must be declared invalid where constitutional rights are involved, and the citation on that case, Your Honor, is Canon vs. Justice Court. It is a prohibition proceeding just like this one. It is 224 ACA 88, and I hope you will have an opportunity to look at that, because it says that where a statute is too broadly drafted, and this broad drafting could result in a constriction of constitutional rights, it has to be held invalid. That is what we are getting at here.

Mr. Shaw: Your Honor, I would like to point out in response to a question, Your Honor asked me a few minutes ago, the justices who participated in the majority decision in Franke vs. Maryland, and who participated in what I consider the majority opinion in at least affirming the Ohio case, Ohio vs. Price, was Frankfurter, Clark, Harlan and Whitaker.

The Court: Who were they?

Mr. Shaw: Frankfurter, Clark, Harlan and Whitaker, with Justice Stewart abstaining, because of his father's [fol. 65] position on the Ohio Supreme Court.

Now, in quoting certain portions of the Franke case, specifically that language which affirmed the right of inspectors to make a systematic area by area search, this was on page 3 of my memorandum of points and authori-

ties, Your Honor, and I might point out that although Your Honor has taken the position that it is not before you, that the Supreme Court of the United States makes no distinction between a private home and an apartment house, they say that this right extends to all dwellings.

I would also like to point out to Your Honor that the two cases that I cited, one is the City of St. Louis vs. Evans, 337 Southwestern 2d 948, wherein the Missouri Supreme Court upheld the right of a building inspector to enter without a search warrant into premises in the performance of his duty between the hours of 9 a.m. and 6 p.m., or at any time necessary in his opinion. The inspection involved there was requested pursuant to an owner application for a permit, and that statute, which is set forth in page 953 of that opinion, is almost identical to ours.

"When necessary in the performance of duty, the building commissioner or subordinate or authorized agents, or any designated official or subordinates or authorized agents, are hereby empowered,"

and so on, to enter any structure, any structure, for the purpose of inspection.

[fol. 66] Now, I also have a case, Givner vs. State, 124 Atlantic, 764, the Court of Appeals of Maryland, State of Maryland, held it constitutional, an ordinance authorizing certain city inspectors to enter premises without a search warrant, at any time during business hours for the purpose of determining whether the structure complied with the code regulations.

Here we have the Supreme Court of two different states, actually we have three: We have Ohio, Missouri, and Maryland—rather the Supreme Court of two of the states and the Court of Appeals in Givner—the Givner ruling on the same issue on practically identical ordinances. For all intents and purposes these three statutes or ordinances are identical in their import.

The Court: Well, I may interpret—so far as may be necessary for the performance of their duties, I may interpret that differently than you interpret it, but so far as

this particular case is concerned, so far as this happens to be an apartment house case, it seems to me that in the performance of their duties, this being an apartment house, and that is conceded, and permits having been issued, they have a right to go into there.

Mr. Shaw: But, Your Honor, counsel is attacking the constitutionality of the entire ordinance, not just applicable to apartment houses.

The Court: I have to decide whether I should issue a writ of prohibition on the facts of this case, don't I?

[fol. 67] Mr. Shaw: Not on the facts of this case, on the—

The Court: The facts on the law of this case.

Mr. Shaw: Of the law involved in this case.

The Court: Well, this is the law as applied to apartment houses.

Mr. Shaw: Very well, Your Honor—

Mr. Krause: If we are going to get into the facts, Your Honor—

Mr. Shaw: —I am not going to—

Mr. Krause: —Mr. Shaw has talked a little bit about the residence of Mr. Camara, and I would like to tell you what we would offer to prove here. We would offer to prove, if Your Honor wanted to get into a factual study—

The Court: All the facts I have to know is if it is stipulated that this is an apartment house, that is all the facts I need know. I am not concerned with any other facts.

Mr. Krause: Yes, because Mr. Shaw has said some things, I feel it necessary to make an offer, Your Honor, just to call it to your attention, to have it on the record.

The Court: All right; all right.

Mr. Krause: We could prove that the building at 225 Jones Street was built in 1923 under a building permit filed with the City and County of San Francisco, number 116526, and that the original plans, as approved by the officials of the City and County of San Francisco provided that the ground floor at 223 Jones Street should contain both the [fol. 68] store and an apartment, that the plans provided for an apartment with a bedroom and a bathroom and a kitchen—

Mr. Shaw: I don't see what relevancy plans have, the permit was for a commercial unit on the ground floor; from the inception in 1924 there has never been any permit issued for an apartment on the ground floor. I feel that is misleading. Any plans the building contractor may have had are completely immaterial.

Mr. Krause: Well, I want to say further that our offer of proof would be that this apartment has been occupied as an apartment since 1923, has never been changed in one aspect.

The Court: This may be well used at the time of trial.

Mr. Krause: Yes.

The Court: But not before this court.

Mr. Krause: Well, I realize your position, but I think I have to get it in here because of what Mr. Shaw has said. He has said that there is an illegal occupancy. And I also want to say that this building permit probably precedes any occupancy requirement by the City and County of San Francisco, and therefore the apartment may very well be legal and we would certainly prove it legal if we were asked to do so, and if it were relevant. I am not saying—Your Honor has said it is not relevant, but I just want to get it into the record.

[fol. 69] The Court: I understand.

Mr. Shaw: I have the permit issued in 1924 which provides for a commercial unit on the ground floor, no apartment. Now, Your Honor—Your Honor, I would like to refer to the statute a minute.

503 provides: "Authorized employees of the City Department or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

It is not restricted to apartment houses. And Mr. Krause, in his petition, is attacking the constitutionality of this ordinance upon its face.

The Court: May I say the way I interpret this ordinance, and you may interpret it different than the way I do, so far as apartment houses are concerned, it is necessary for the performance of their duties that they make these spot checks, there is no question about it, but it is not necessary for the performance of their duties that they make a spot check of a home. They have got to have some ground for it. But it is absolutely necessary in the performance of their duties to check any apartment house they want to. That is the way I interpret the section. You may say that they can make a spot check of a home. I don't see that [fol. 70] means that under necessary performance of their duty. The words "necessary for the performance of their duties" accords due process. It is not vague to the Court, but this is not before me.

Mr. Shaw: In order to determine what was encompassed under performance of duties, we would have to present to Your Honor all the various duties imposed upon departmental officials of the City government, which do require them to go into homes.

The Court: Under certain circumstances, yes.

Mr. Shaw: There are many.

The Court: But that is in the performance of their duty; they just can't willy nilly ring a door bell out in Ingleside, and just ring a door bell and say, "I am going to look in your kitchen."

Mr. Shaw: I misunderstood your—

The Court: They don't do that.

Mr. Shaw: They can do that in performance of their duties.

The Court: In the performance of their duties.

Mr. Shaw: We are in agreement on that, excuse me.

The Court: And the Court says obviously in the performance of their duties, they have a right to go into any apartment house they want to, that is part of their duties. Permits are issued. They can do that, just like you can go out to the hospital and inspect a hospital, or the inspectors [fol. 71] can come in and inspect certain records involving

narcotic prescriptions in a doctor's office, that is in the performance of their duties, and I would hold that it is not in the performance of their duties to make a willy-nilly check of a home: Just because I want to be spiteful, I am going to ring a door bell, that is not in the performance of their duties. In that section, in the performance of their duties is what saved this ordinance.

Mr. Shaw: I understand, Your Honor.

The Court: And certainly in the performance of their duties, they have a right to go check apartment houses, and therefore I don't see how you can prevail, Mr. Krause. I want you to clearly understand my position. If you think I approve anybody ringing any door bell in any place, I don't think the code provides for that, it has to be in the performance of their duties.

Mr. Krause: I wish we would take—all right, I understand Your Honor's position, and I wish you would do two things before you finally decide this case: I wish you would consider whether, in the performance of their duties really limits the places where they can go, or merely refers to the powers they have under the housing code to inspect for certain purposes. It would be my position that in the performance of their duties means only that they must have the intent in their mind to do something that they are empowered to do under the code. In the performance of their [fol. 72] duties to me doesn't say one thing about where they can do it, it doesn't say—

The Court: Obviously they have a right, if you issue permits, to inspect, that is, in the performance of their duty.

Mr. Krause: Yes, but of course—and if each apartment dweller had to have a permit, then I would say we would be in bad shape; but the fact is that only the owner of the apartment has to have a permit.

The Court: That's right.

Mr. Krause: It's been stipulated now that Mr. Camara is not the owner of the apartment, but merely an apartment dweller, and I think that—

The Court: You can argue that, counsel, down in the trial court.

Mr. Krause: All right.

Now, here's another thing that I wish you would consider before you finally make up your mind, and that is this: Is it right to allow a person who has a private home to be completely free from this kind of inspection to make sure that his kitchen is cause, but when he moves into an apartment, then an inspector can come knocking on his door willy-nilly without any cause, get in there and snoop around? Now, this is dangerous to my mind. This means that an inspector can go in and violate the right to privacy which an apartment dweller has but he can't violate the [fol. 73] same right which a home owner has. I don't think that is the law. I think it is dangerous because I think the people have the right to privacy, and without being inspected in any situation in the absence of the—

The Court: When you move into an apartment house, you move in with the understanding that that may be inspected, otherwise you don't have to rent that apartment. That is one of the conditions under which you move in, and therefore you can draw that distinction.

Mr. Krause: Well—

The Court: Now, let's take a hospital. They go out and inspect hospitals. The Board of Medical Examiners go out and inspect them.

Mr. Krause: Yes. The whole premises are licensed public premises, there is no privacy, there is no Fourth Amendment right to a hospital room, that belongs to the hospital, and the hospital itself is licensed; there is no Fourth Amendment right to keep your restaurant private, if you are running a restaurant, but there is a Fourth Amendment—the Fourteenth Amendment, to be more accurate, right to keep your apartment private, and in the absence of cause, and there is the same right that applies to a private home.

The Court: I am not saying now if this case goes to trial you are going to lose.

Mr. Krause: I would like to win it here, frankly.

The Court: No, in this case you cannot. I am convinced [fol. 74] that—first of all, I do have the decisions of the United States courts. What I say is, when you move into an apartment house—what you are doing is saying when I move into this place, they have a right to inspect my premises, otherwise you don't have a right to move into the apartment house, and I say in the performance of their duties, does not permit you to just ring a man's door bell in a private house. You say why should there be a distinction. The answer is, you move into an apartment and therefore that is that distinction. But forgetting my saying all that, drawing the distinction, because it doesn't appeal to me to go to anybody's home and walk right in. The fact remains we do have the United States courts' decision.

Mr. Krause: I have, of course, an argument on that, and I would very much like to present it to you.

The Court: What is that?

Mr. Krause: And that is this: That first of all, the *Franke vs. Maryland* and the *Ohio* case were decided under the Fourteenth Amendment, and the Fourteenth Amendment at the time those cases were decided, was held by the Supreme Court—the Fourteenth Amendment at the time those cases were decided was held by the Supreme Court not to fully incorporate the search and seizure provisions of the Fourth Amendment, but only that essential portion of the Fourth Amendment. That is why under the doctrine of *Wolfe vs. Colorado*, evidence seized in violation of the [fol. 75] Fourth Amendment could still be used in state criminal trials, whereas Your Honor knows better than I do, since 1914, in *Weeks vs. the United States*, evidence illegally seized could not be used in federal courts.

Now, just about two years ago the U. S. Supreme Court decided *Mapp vs. Ohio*, and they said, "We are overruling *Wolf vs. Colorado*, no longer may evidence illegally seized be used in criminal trials in the state courts and we now hold the Fourteenth Amendment incorporates the entire Fourth Amendment."

Now, I submit that the reason that *Franke vs. Maryland* and *Ohio vs. Price* went the way they did is because of this idea that only a portion of the Fourteenth—Fourth Amendment was incorporated in the Fourteenth and not the whole thing, and once—

The Court: Mr. Krause, the way I interpret this—

Mr. Krause: Yes.

The Court: —section, your argument doesn't apply. Maybe I interpret it one way and the District Attorney interprets it that way, but the way I interpret this ordinance, you don't have anything to fear.

Mr. Krause: I realize that. I realize that what Your Honor is saying is that if I had—if this situation involved a private home, that you would be disposed to issue the writ of prohibition, but since it involves an apartment—

The Court: And the permit, you have to have a permit, [fol. 76] to operate the apartment house, they have a right to inspect—

Mr. Krause: Well, then—

The Court: This isn't a good vehicle to come up on now. I don't say in this the lessee is going to get caught. I may draw a distinction between the owner of the apartment and simply the lessee, they may find themselves in trouble in that particular phase of the case, but that is not before me.

Mr. Krause: I understand Your Honor's position, and there is no sense in me continuing this argument because it is really irrelevant to what your stand is. I want you to know that I don't agree with this distinction.

The Court: You don't agree between the distinction between the apartment house, that they have a right to go into any apartment house?

Mr. Krause: No, I wouldn't agree with that, I think that they have to show the same kind of cause they have to show for a private dwelling.

Mr. Shaw: It's interesting to point out here, Your Honor, since we have gone into the factual matters, that the owner did attempt to get the inspectors in and the defendant still refused, so I don't think there would be any problem on that score.

The Court: I have nothing to say about the trial of the case, but, Mr. Krause, you are anticipating to change the complexion of the Court, and the new Court will make new [fol. 77] laws, as you know, but ours is—but I won't add that comment, but I'm just trying to project this into a court, I'm not so sure they would say in this particular situation that they would go along with you, you have got the wrong vehicle to go up on. And I interpret this to mean in the way that I have said it, if they just willy-nilly rang a door bell in my house, they would be in difficulty. I don't think that performance of the duty means that. To abate a nuisance you have got cause to believe that there is a nuisance, apartment houses, no question about it, none whatsoever.

Mr. Shaw: Your Honor, before you rule, counsel and I were going to stipulate to one correction in his petition, on page 2, paragraph 5, that the complaint was filed on November 27th, 1963, rather than December 10, 1963.

You move to amend on its face?

Mr. Krause: Yes, I move to amend—

Mr. Shaw: Page 2—

Mr. Krause: Page 2 of our petition, line 24, to strike December 10, 1963, and insert November 27, 1963.

The Court: May be granted, and, Mr. Krause and Mr. Shaw, I went over this phrase very carefully, "so far as it may be necessary in the performance of their duties." If they had left out "so far as it may be necessary in the performance of their duties," there wouldn't be any question about it, and duties mean they have got an obligation, they have got an obligation to come in and check these [fol. 78] apartment houses, no question about it. If they didn't do it, they would violate their oaths.

Mr. Shaw: I would like to make one more amendment on page 6 of my memorandum of points and authorities. The citation of Givner vs. State is 124 Atlantic 2d. That is line 16. May it be so amended?

The Court: I found it.

Mr. Shaw: I am sorry.

The Court: That's all right. You may correct, gentlemen, each of you may correct these pleadings with the appropriate notation.

I was very interested in your argument about the Fourteenth incorporating all of the Fourth, and I'm sure with—we will call it the conservative group, that decided the Four—now, you have got Goldberg, though Justice White has been following, I think, the conservative trend, hasn't he?

Mr. Shaw: Yes, Your Honor.

Mr. Krause: I would say so. We won't give him up for lost yet.

The Court: And if you take this up on appeal and go all the way to the Supreme Court of the United States, Mr. Shaw and I will get our name in the big book, so to speak.

Prepare the order. We need findings, Mr.—

Mr. Krause: Yes. I think findings are necessary.

Mr. Shaw: I didn't prepare findings.

The Court: You don't have to—you have time, and [fol. 79] then you submit them, and maybe you can work out findings in accordance with what the Court has said.

Mr. Shaw: Have you made—

The Court: I make the ruling the writ of prohibition is—

Mr. Krause: Before you rule, I want to express our intention to appeal, and I would like the alternative writ to stay in effect until the time for notice of appeal expires, and to stay in effect if we do file our notice of appeal.

Mr. Shaw: I don't feel that that would be appropriate, Your Honor.

The Court: No, I don't want to stop the—you can get over to the appellate court. You get your papers ready, because it's going to take some time. You have ten days after he prepares his findings, you put in your counter findings.

Mr. Krause: Well, I am concerned that this—

The Court: Counsel, until I sign the written order, everything is still in effect, the alternative writ is still effective.

Mr. Shaw: I don't believe, although I am not much of a civil lawyer, I don't believe that findings are absolutely necessary, unless Your Honor requires them.

The Court: I don't want them, but, Mr. Krause, are they essential under the law? I don't want to—

Mr. Krause: I will give it some thought, Your Honor, [fol. 80] and—

Mr. Shaw: Well, he—

The Court: When is the case back before the Court?

Mr. Shaw: I don't think it's up to counsel, it's up to Your Honor, whether you want them.

The Court: I don't want them.

Mr. Shaw: I don't particularly care to prepare any findings, it's a very simple order which is in the record that Your Honor denies the petition.

The Court: Of course, you have got your transcript to go up on, my remarks—

Mr. Krause: Yes.

The Court: —so you are sufficiently protected.

Mr. Krause: Yes.

The Court: How long will it take you to get—you will have to get relief from the appellate court.

Mr. Krause: Yes. Well, I am thinking now that if I file a notice of appeal, proceedings will be stayed.

The Court: No, they are not—

Mr. Krause: Well—

The Court: Proceedings are not stayed.

Mr. Krause: I will have to do something, because I don't want—

The Court: That has to be done in the court of appeal, Mr. Krause, but what I will suggest is that he will prepare the order, and—it would be an idle victory if, for example, [fol. 81] the Court were to send it back and say, "Let the Court prepare findings." That wouldn't do you any good, would it?

Mr. Krause: No, no, I am not trying to win on any technicality.

The Court: You are trying to win on the constitutionality of the section, and I hold it to be constitutional, and I interpret it in the transcript, so prepare your order, and submit it to him for approval, and I will sign it.

Mr. Krause: Well, before you sign that, may I have some notice about it, so I can proceed to seek to stay the proceedings then?

The Court: Oh, I'll assure you of this, I'll give you—how much time would you want before—when he presents it, I will make this a practice, I will hold it back a few days.

Mr. Shaw: I will have it here tomorrow, Your Honor.

Mr. Krause: Well, all right, if you will hold it back a week, that will probably—

The Court: You submit it, but I would like you to submit it approved as to form, counsel. I don't think findings are required. You made an attack on the constitutional issue. The pleadings show it's an apartment house and that's all I know.

Mr. Shaw: Findings were—there are questions of fact involved—

[fol. 82] The Court: There are no questions of fact. Now, you know in the ABC cases, the Court will grant a stay on an alternative writ, it dies unless the court of appeal grants you the—

Mr. Krause: Yes.

The Court: Stay.

Mr. Krause: Yes.

The Court: I assure you if the appellate court in its wisdom wants to grant you a stay, I have no objection at all.

Mr. Krause: O.K., we will see what we can do.

The Court: I won't sign the order until a week—until from—no, you want to sign it Friday the 13th? You are not superstitious, are you?

Mr. Shaw: No, Your Honor.

The Court: All right.

The Clerk: What is the order, writ of prohibition—

RULING DENYING PETITION FOR WRIT OF PROHIBITION

The Court: Petition for writ of prohibition will be denied, the alternative writ will be discharged upon the Court signing the judgment.

Mr. Shaw: For the record, is there any other relief that you feel your petition requested or sought?

Mr. Krause: Well, I think the ruling of the Court disposes of the issues, certainly.

The Court: I will not sign this until either the 13th, Friday the 13th, or Monday the 16th.

Mr. Krause: Thank you, Your Honor.

[fol. 83] The Court: And so that the alternative writ will be discharged, I will say when I sign the written judgment and all—written order and judgment.

Mr. Shaw: I am sure that this could have been taken care of more easily had the calendar in the municipal court, being what it is, I don't think they would press Mr. Krause to trial next week.

The Court: No, I'm sure they— It is very interesting, this argument about the Fourteenth incorporating the Fourth.

Mr. Shaw: I might mention, Your Honor, that the Supreme Court did consider the Fourth and the Fifth Amendments in rendering their decisions here.

The Court: I know, but he says in this most recent decision, that they have changed their whole attitude about the Fourteenth incorporating the Fourth.

Mr. Shaw: Yes.

Mr. Krause: Not only that, the only thing considering this case and this issue on the Fourth Amendment was that D.C. case, the Little case, the court did decide that no search would be allowed by a health inspector. I cited that in my brief.

The Court: I read—I examined all the authorities and thought about it a great deal, and I interpret the section in one way, maybe the—I understand the mayor has sug-

gested that some of these ordinances be rewritten. Have [fol. 94] you heard anything about that, counsel?

Mr. Shaw: I just read about it.

The Court: And maybe he wants to make this language a bit more specific, but it is not vague to me.

Mr. Krause: Thank you, Your Honor.

The Court: Thank you very much. All right, counsel.

[fol. 85] Certificate of Official Reporter (omitted in printing).

[fol. 86] Clerk's Certificate (omitted in printing).

[fol. 87]

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

1 Civil No. 22128

ROLAND CAMARA, Plaintiff and Appellant,

v.

THE MUNICIPAL COURT OF THE CITY AND COUNTY OF
SAN FRANCISCO, Defendant and Respondent.

OPINION—Filed September 22, 1965

This is an appeal from an order denying a writ of prohibition.

The Division of Housing Inspection of the Department of Public Health is required, under part III, section 86, of the San Francisco Municipal Code, to make an annual inspection of all San Francisco apartment houses for the purpose of licensing such apartment houses and issuing permits of occupancy.

On November 6, 1963, Inspector Nall visited the premises at 225 Jones Street for the purpose of making such an inspection, and was informed by the manager of said apartment building that the lessee of a ground floor rental unit (223 Jones), which was restricted to commercial use under an existing permit of occupancy, was using the leased premises as a residence and was living in the rear of his store. Nall then called on plaintiff, who admitted that he was living in the rear of his store, but refused to allow Nall to enter and inspect the premises. Two days later Nall [fol. 88] returned and was again refused permission to inspect the premises. Plaintiff failed to appear on a citation issued by the district attorney, after which an inspector again went to plaintiff, informed him of the health department's duty to make an annual inspection of all San Francisco apartment houses, and further informed him that the existing permit of occupancy authorized commercial and not residential use of the ground floor unit leased by plaintiff. Plaintiff again refused to allow said premises to be inspected.

Plaintiff was subsequently arrested and charged with violating section 507 of the Housing Code of the City and County of San Francisco (hereinafter referred to as "Housing Code").

Plaintiff expressly concedes that he committed the offense proscribed by section 507 of the Housing Code and that his defense to prosecution for said charge is predicated solely upon the alleged unconstitutionality of section 503 of said code. Plaintiff asserts that section 503 authorizes an unreasonable search and seizure, in violation of article I, section 19, of the California Constitution and the Fourth Amendment to the federal Constitution; as applied to the states through the Fourteenth Amendment.¹ Plaintiff also relies upon the privileges and immunities clauses of the Fourteenth Amendment.

¹ Although the petition also alleged, as above noted, that section 503 violated article I, section 1, of the California Constitution, plaintiff has apparently abandoned this point on appeal.

Section 503 of the Housing Code provides as follows: "Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

[fol. 89] Section 507 of the Housing Code provides in pertinent part that "[a]ny person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code . . . shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code"

The question whether an ordinance such as section 503 of the Housing Code is vulnerable to attack upon the constitutional grounds raised by plaintiff is one of first impression in this state. However, the constitutionality of similar regulations enacted in other jurisdictions has been challenged on several occasions and, in all but one instance, has been upheld.

We discuss first the only case which resulted in a finding of unconstitutionality, to wit: *District of Columbia v. Little* (D. C. Cir. 1949) 178 F.2d 13. This case was later affirmed on other than constitutional grounds, (*District of Columbia v. Little* (1950) 339 U.S. 1). We do so because the remaining cases to which we shall refer, consider and then decide adversely to the arguments of unconstitutionality supported by the *Little* decision. In *Little*, the court undertook to determine the validity of certain regulations of the District of Columbia which required owners and occupiers of premises to maintain them in a clean and wholesome condition, authorized health officials to examine any building sup-

posed or reported to be in an unsanitary condition and denominated as a misdemeanor interference with an in-[fol. 90] spection. Defendant Little was convicted of hindering, obstructing and interfering with a health inspector in the performance of his duties upon a showing that she had refused to unlock the door of her private residence to a health inspector who was investigating a complaint that there was an accumulation of loose and uncovered garbage and trash in the halls and that certain persons residing in the house had failed to avail themselves of the toilet facilities. The conviction was subsequently reversed, the federal circuit court of appeals holding that the Fourth Amendment prohibited health officials without a warrant from invading a private home to inspect it, even though there was probable cause to believe that there existed within the dwelling a violation of a law designed to protect the health, safety or welfare of the public. The court expressly rejected the contention that the Fourth Amendment was premised upon and limited by the Fifth Amendment and was therefore inapplicable to regulations which only incidentally involved criminal charges and which were primarily designed to protect the public health.

A dissenting opinion by Judge Holtzoff took the position that the Fourth Amendment was applicable only to proceedings of a criminal character and that the right of inspection in the interest of public safety and health was essentially a civil matter to which any criminal prosecution was only incidental.

Upon appeal to the Supreme Court of the United States, Mr. Justice Black rendered the opinion of the court that respondent Little had not been guilty of "interference" under the controlling District regulation (*District of Columbia v. Little* (1950) 339 U.S. 1). Accordingly, it was un-[fol. 91] necessary to determine the validity of the ordinance involved.

We now discuss in order the four cases involving the constitutionality of ordinances similar to that involved herein,

and in each of which, as we have noted, the Little case was considered at length. However, the reasoning of the Little case did not persuade any of the appellate courts concerned and in each case the ordinance was held a valid exercise of the police power.

The first case is *Givner v. State* (1956) 124 A.2d 764 (210 Md. 484), wherein the Maryland Court of Appeals upheld three Baltimore ordinances which authorized health, fire and building inspectors to enter upon premises during daylight hours for the purpose of conducting inspections to determine whether such premises complied with the applicable regulations and which imposed a fine upon an owner or occupier who refused to allow such inspection. Two of the ordinances, which were substantially identical with section 503 of the Housing Code, contained no requirement of probable cause to suspect the existence of a nuisance and authorized representatives of the Building Inspection Engineer and the Chief Engineer of the Fire Department to enter "any building, structure or premises" during daylight hours "for the purpose of performing his duties" under the code.

Defendant Givner, who was convicted of violating these ordinances, contended on appeal that they were prohibited by the due process clause of the federal Constitution and by an article of the state Constitution which the court characterized as being *in pari materia* with the Fourth Amendment of the federal Constitution. After discussing the Little case at length, the court chose not to follow its reasoning and overruled the constitutional objections to [fol. 92] the ordinances on the ground that the inspections or searches authorized by said ordinances were not "unreasonable." Although the court expressed doubt that either the federal or state prohibitions against unreasonable searches and seizures could be deemed inapplicable in civil matters, the court nevertheless concluded that different standards of reasonableness applied to a search for evidence to prove guilt of a crime than to an inspection for

the purpose of protecting the public health or safety. Since the inspections authorized by the ordinances under attack were of a routine nature, which were to be made at reasonable hours and were primarily for protective and not punitive purposes, they could not be deemed unreasonable and could lawfully be made without search warrant.

In *Frank v. Maryland* (1959) 359 U.S. 360, the United States Supreme Court, in a five-to-four decision, upheld the validity of one of the three Baltimore inspection ordinances involved in the Givner case. However, the ordinance in question was the most narrowly drawn of the three and authorized the Commissioner of Health to demand entry to any house, cellar or enclosure, during daylight hours, only if he "shall have cause to suspect that a nuisance exists" therein. The ordinance imposed a \$20 fine upon any owner or occupier who refused or delayed to allow such entry and submit to the inspection.

Defendant Frank was convicted of violating said ordinance after he refused to allow an inspection by a health official who was acting upon a neighbor's complaint of rats and who had observed that the defendant's house was in an extreme state of decay and that a large quantity of straw and debris containing rat feces was located at the [fol. 93] rear of the house.

Frank's conviction was affirmed by the United States Supreme Court in a majority opinion delivered by Mr. Justice Frankfurter, with whom Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Stewart concurred (Mr. Justice Whittaker specially concurring by way of clarification of the rule adopted by the majority). The court concluded that although the right to be secure from an invasion of personal privacy was protected by the Fourth Amendment, as applied to the states through the Fourteenth Amendment, the primary purpose of the Fourth Amendment was to safeguard the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures. The court noted that under the Baltimore City Code,

an occupant who had failed to maintain a building in hygienic condition was notified to abate the sub-standard conditions and was subjected to criminal prosecution only in default of such correction. The attempted inspection of Frank's house was accordingly for the purpose of ascertaining evils to be corrected and not for the purpose of securing evidence upon which a criminal prosecution could be based. Since the Baltimore ordinance authorized such an inspection only during reasonable hours and upon valid grounds for suspicion of the existence of a nuisance, the court concluded that Frank's resistance could only have been based upon a denial of any official justification for entry to his home. Such right was upon the periphery of the important interests safeguarded by the Fourth and Fourteenth Amendments and was outweighed by the city's vital need to maintain adequate standards of health.

Since the Baltimore ordinance, unlike section 503 of the [fol. 94] Housing Code, contained a requirement of probable cause for an inspection, the majority opinion in the Frank case clearly does not establish the validity of section 503. However, the majority opinion in Frank does contain certain language indicating that an ordinance authorizing routine, periodic inspections, for which probable cause might obviously be lacking, would similarly be immune to constitutional attack. The court stated: "Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few." (Frank v. Maryland, *supra*, at p. 372.)

Mr. Justice Douglas, with whom Chief Justice Warren, Mr. Justice Black and Mr. Justice Brennan concurred, wrote a dissenting opinion in which he expressed the view that a health official was not entitled, under the Fourth and Fourteenth Amendments, to enter a private dwelling without first having secured a warrant upon a showing of probable cause to make an inspection.

In *State v. Price* (1958) 151 N.E.2d 523, a case decided one year prior to *Frank v. Maryland*, supra, the Ohio Supreme Court upheld the validity of a Dayton ordinance which was substantially identical with section 503 of the Housing Code in that it contained no requirement of [fol. 95] probable cause and authorized the Housing Inspector to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises within the city "in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public." The ordinance required owners or occupants of such premises to allow entry for such inspection at any reasonable hour. Any person violating the ordinance was subject to fine, imprisonment, or both.

Defendant was convicted of violating said ordinance by refusing to admit a housing inspector to his premises.

The Ohio Supreme Court upheld the ordinance and the conviction was affirmed. The court concluded that the Fourth Amendment of the federal Constitution was inapplicable to the states and that the applicable provision of the state Constitution did not prohibit a reasonable search such as that authorized by the Dayton ordinance. The court, in so holding, commented at length upon the decision of the federal circuit court of appeals in *District of Columbia v. Little*, supra, but chose to follow *Givner v. State*, supra, and the views expressed by the Holtzoff dissent in the *Little* case.

The decision in *State v. Price*, supra, was appealed to the United States Supreme Court, which noted probable

jurisdiction of the appeal, by a vote of four to four, less than one month after it had decided *Frank v. Maryland*, supra. (Ohio ex rel. *Eaton v. Price* (1959) 360 U.S. 246.)² Since the United States Supreme Court was equally divided, [fol. 96] the case was not taken over by that court and the judgment of the Ohio Supreme Court was not affected.

The most recent decision dealing with the validity of an inspection ordinance is *City of St. Louis v. Evans* (1960) 337 S.W.2d 948. The ordinance in that case authorized the building commissioner or his authorized agent to enter any structure or portion thereof when necessary in the performance of duty at any time between 9:00 a.m. and 6:00 p.m. or at any time it was necessary in his opinion. The ordinance further provided that if the right of entry were denied, the official might invoke the aid of the police department in order to gain such entry. Another ordinance designated as a misdemeanor offense hindering, obstructing, resisting or otherwise interfering with a city officer in the discharge of his official duties. Defendants Evans and Hourigan, the caretaker and the owner of a rooming house, refused to allow a city building inspector to enter certain portions of the building to ascertain whether they were being used in accordance with an existing occupancy permit and persisted in such refusal even after the inspector had enlisted the aid of a police officer. The two defendants were subsequently charged with a violation of the ordinance. Although the trial court entered judgment dismissing the prosecution and discharging the defendants, said judgment was reversed by the Missouri Supreme

² Since Mr. Justice Stewart's father was a member of the Ohio Supreme Court and had participated in the decision in *State v. Price*, supra, he disqualified himself from sitting on the case. (Ohio ex rel. *Eaton v. Price*, supra, at p. 249.) The four Justices who had dissented in *Frank v. Maryland*, supra, voted to note probable jurisdiction of the Price appeal, and the four who comprised the majority in *Frank* expressed the view that that case was completely controlling of the Price case. (Ohio ex rel. *Eaton v. Price*, supra.)

Court, which held that neither of the above-mentioned ordinances violated the privileges and immunities, equal protection or due process clauses of the Fourteenth Amendment [fol. 97] to the federal Constitution or certain provisions of the state Constitution which prohibited unreasonable searches, self-incrimination and double jeopardy. The court pointed out, however, that since neither Evans nor Hourigan resided in the portion of the premises which the inspector sought to enter, the facts presented no issue as to their right of personal privacy or private residence.

We are persuaded that the reasoning of the authorities upholding the constitutionality of this type of inspection statute should be followed by this court. As we have noted, with the sole exception of the federal circuit court of appeals which decided *District of Columbia v. Little*, supra, the constitutionality of ordinances similar to section 503 of the Housing Code have been upheld. We believe that such a result is an eminently reasonable one and that it is urgent in this day of the megalopolis that citizens be protected from conditions deleterious to their health and welfare, and that this right to protection should not be deemed subordinate to the individual's right to resist any official infringement, however reasonable, upon the ground of absolute privacy of his dwelling.

The Housing Code, of which section 503 is a part, commences with section 101, wherein "[i]t is found and declared that there exist in the City and County of San Francisco substandard and insanitary residential buildings and dwelling units whose physical conditions and characteristics render them unfit or unsafe for human occupancy and habitation, and which conditions and characteristics are such as to be detrimental to or jeopardize the health, safety, and welfare of their occupants and of the public." [fol. 98] "It is further found and declared that the existence of such substandard, insanitary, obsolete and deficient buildings and dwelling units threatens the physical, social and economic stability of sound residential buildings and

areas, and of their supporting neighborhood facilities and institutions; necessitates disproportionate expenditures of public funds for remedial action; impairs the efficient and economical exercise of governmental powers and functions; and destroys the amenity of residential areas and neighborhoods and of the community as a whole.

"For these reasons it is hereby declared to be the policy of the City and County of San Francisco:

"1. That it is in the public interest of the people of San Francisco to protect and promote the existence of sound and wholesome residential buildings, dwelling units and neighborhoods by the adoption and enforcement of such standards, regulations and procedures as will remedy the existence or prevent the development or creation of dangerous, substandard, insanitary or obsolete and deficient residential buildings and dwelling units. . . ."

The purpose of the Housing Code, as set forth in section 103, "is to provide minimum requirements for the protection of life, limb, health, property, safety, and welfare of the general public and the owners and occupants of residential buildings, erected or to be erected in San Francisco. . . ."

Section 503 of said code, which authorizes certain city officials to enter and inspect buildings and other structures within the city, requires that any such inspection be made in the course of official duty, at reasonable hours and only [fol. 99] upon presentation of proper credentials.

If such inspection should result in a finding that any building or portion thereof is substandard, the owner is directed to remedy the defective condition, under section 505, and may appeal such order to the Housing Appeals Board, under section 1706. A penalty is imposed upon the owner, pursuant to section 507, only if he neglects or refuses to comply with the order of correction.

We conclude, from an examination of the above-quoted provisions, that section 503 is part of a regulatory scheme

which is essentially civil rather than criminal in nature, inasmuch as that section creates a right of inspection which is limited in scope and may not be exercised under unreasonable conditions.

The ordinance is thus no broader in scope than those upheld in *Givner v. State*, supra; *State v. Price*, supra; and *City of St. Louis v. Evans*, supra; and plaintiff's constitutional objections must fail.³

The order appealed from is affirmed.

Shoemaker, P. J.

We Concur: Agee, J., Taylor, J.

³ It may be noted that plaintiff places considerable emphasis upon the fact that the ordinance authorizes an inspection without any showing of probable cause. However, the facts in the present case fall short of establishing that the attempted inspection of plaintiff's apartment was not based upon such a showing. Although the petition alleged that the inspection was routine in nature and was not occasioned by any complaint concerning the premises, the answer directly controverts this allegation. Plaintiff thereafter elected to stand upon the assertion that the ordinance was unconstitutional on its face. The instant case is therefore factually indistinguishable in this respect from the *Givner*, *Price* and *Evans* cases.

Order Due
November 19, 1965

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CAMARA

v.

THE MUNICIPAL COURT OF THE CITY & COUNTY OF
SAN FRANCISCO

ORDER DENYING HEARING AFTER JUDGMENT BY
DISTRICT COURT OF APPEAL

1st District, Division 2,

Civ. No. 22128

Petition for hearing Denied.

Peters, J., and Peek, J., are of the opinion that the
petition should be granted.

Traynor, Chief Justice.

[fol. 101]

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

No. 22128

ROLAND CAMARA, Plaintiff and Appellant,

vs.

MUNICIPAL COURT OF THE CITY AND COUNTY OF
SAN FRANCISCO, Defendant and Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed December 20, 1965

Notice is hereby given that Roland Camara, plaintiff and appellant in the above case, hereby appeals to the Supreme Court of the United States from the final judgment of the District Court of Appeal of the State of California, First Appellate District, Division Two, affirming the judgment of the Superior Court of the State of California in and for [fol. 102] the City and County of San Francisco, filed and entered in this proceeding on September 22, 1965.

This appeal is taken pursuant to 28 U.S.C. sec. 1257(2) and this notice is filed pursuant to Rules 10 and 11 of the Revised Rules of the Supreme Court of the United States. The Clerk of this Court is requested to prepare a transcript of the record of this case for transmission to the Clerk of the Supreme Court of the United States, at the Supreme Court Building, Washington, D. C., and include in the transcript certified copies of the following:

(1) The opinion of the District Court of Appeal, filed September 22, 1965.

(2) The order denying a hearing in the Supreme Court of the State of California.

(3) The Clerk's Transcript.

(4) The Reporter's Transcript.

(5) One copy of the briefs filed by the parties including the appellant's petition for a hearing by the Supreme Court.

(6) The order allowing the record to be augmented by the Housing Code of the City and County of San Francisco.

(7) The Housing Code of the City and County of San Francisco.

(8) This Notice of Appeal.

The following questions are presented by this appeal:

[fol. 103] (1) Whether section 503 of the Housing Code of the City and County of San Francisco, which authorizes City employees to inspect private dwellings without warrant or the existence of probable cause for such inspection, and section 507 of the Housing Code which provides a criminal penalty for failure to allow such inspections, are unconstitutional as authorizing an unreasonable search forbidden by the Fourth and Fourteenth Amendments to the Constitution of the United States.

(2) Whether sections 503 and 507 of the Housing Code are unconstitutional as allowing a search for criminal evidence without warrant, arrest or emergency in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

(3) Whether sections 503 and 507 of the Housing Code are unconstitutional under the doctrine of *Griswold v. Connecticut*, — U.S. —, 14 L.Ed.2d 510 (1965) protecting the right of privacy.

Dated: December 17, 1965.

Marshall W. Krause, Attorney for Appellant.

[fol. 104] Proof of Service (omitted in printing).

[fol. 105]

EXCERPTS FROM SECTIONS FROM THE SAN FRANCISCO HOUSING CODE, CHAPTER XII OF SAN FRANCISCO MUNICIPAL CODE

Sec. 101. Declaration of Policy. It is found and declared that there exist in the City and County of San Francisco substandard and insanitary residential buildings and dwelling units whose physical conditions and characteristics [fol. 106] render them unfit or unsafe for human occupancy and habitation, and which conditions and characteristics are such as to be detrimental to or jeopardize the health, safety, and welfare of their occupants and of the public.

It is further found and declared that there exist in the City and County of San Francisco residential buildings and dwelling units which were legally constructed according to standards now generally recognized to be obsolete and deficient in terms of current, modern housing standards for construction, use, occupancy, light and ventilation and sanitary facilities. The continued existence of these obsolete and deficient residential buildings and dwelling units is detrimental to or jeopardizes the health, safety, and welfare of their occupants and of the public.

It is further found and declared that the existence of such substandard, insanitary, obsolete and deficient buildings and dwelling units threatens the physical, social and economic stability of sound residential buildings and areas, and of their supporting neighborhood facilities and institutions; necessitates disproportionate expenditures of public funds for remedial action; impairs the efficient and economical exercise of governmental powers and functions; and destroys the amenity of residential areas and neighborhoods and of the community as a whole.

For these reasons it is hereby declared to be the policy of the City and County of San Francisco:

1. That it is in the public interest of the people of San Francisco to protect and promote the existence of sound

[fol. 107] and wholesome residential buildings, dwelling units and neighborhoods by the adoption and enforcement of such standards, regulations and procedures as will remedy the existence or prevent the development or creation of dangerous, substandard, insanitary or obsolete and deficient residential buildings and dwelling units.

2. That the adoption and enforcement of a Housing Code is a necessary municipal governmental function in the interest of the health, safety, and welfare of the people of San Francisco.

Sec. 103. Purpose. The purpose of this Code is to provide minimum requirements for the protection of life, limb, health, property, safety, and welfare of the general public and the owners and occupants of residential buildings, erected or to be erected in San Francisco. In case of any conflict between the provisions of this Code and the Municipal Code, the most restrictive shall govern.

Sec. 203.3. Ceiling. The undersurface of the overhead covering of a room.

Ceiling Height. The distance between the finished floor and the finished ceiling.

Cellar. Cellar means any portion of a building or structure with a ceiling any part of which is less than seven (7) feet above the actual adjoining ground levels.

Chief, Division of Fire Prevention and Investigation. The Chief Division of Fire Prevention and Investigation—City and County of San Francisco.

[fol. 108] City and County. City and County of San Francisco.

Closet. A non-habitable space having less than the minimum required floor area or other legal requirements of a habitable room.

Conservation. Area. Conservation area shall mean an area in the City and County which is to be protected from blighting influences and maintained in a safe and sound state or, in a declining area, improved and preserved from further deterioration. Such an area shall consist of at least one block within which planned area inspection is necessary to promote the public safety, health, and welfare. Upon recommendation of the Director of Planning such areas may be designated by the Chief Administrative Officer.

Court. Any space on a lot other than a yard which, from a point not more than two (2) feet above the floor line of the lowest story in the building on the lot in which there are windows from rooms abutting and served by the court, is open and unobstructed to the sky, except for projections permitted by this Code.

Outer Court. A court, one entire side or ends of which is bounded by a front yard, a rear yard, a side yard, a front of lot, a street, or a public alley.

Inner court. Any court which is not an outer court.

Sec. 203.16. Pantry. A space accessible to a dining room or kitchen for the storage of food, dishes or utensils.

Partition. An interior vertical separation running from floor to ceiling and dividing one part of an enclosure from another.

[fol. 109] **Person.** Any person, firm, association, organization, partnership, business trust, corporation, company, municipal, state or federal agency, executors, administrators, successors, assigns or agents or their heirs.

Planned area inspection. Planned area inspection shall mean the inspection of all residential buildings within a rehabilitation area or conservation area for the purpose of determining all violations of this Code and the elimination of all such violations in accordance with this Code.

It shall also mean a study to determine whether conditions in any area of the city involve aspects of urban renewal as defined in this Code.

Planning Code. The San Francisco City Planning Code, Chapter II, Part II, of the San Francisco Municipal Code.

Plumbing and Gas Appliance Code. The San Francisco Plumbing and Gas Appliance Code, Chapter VII, Part II, of the San Francisco Municipal Code.

Porch. A porch is a projection or appendage on the exterior of a building which has a roof, the ceiling height of which cannot be less than seven (7) feet. The roof may be supported on the porch floor structure, on an independent foundation, or be cantilevered from the building. Where one balcony is placed one story above another balcony, the construction constitutes a roofed porch.

Premises. Land including improvements or appurtenances or any part thereof.

[fol. 110] **Sec. 203.18. Rehabilitation area.** Rehabilitation area shall mean an area of the City and County in which deteriorated structures, neighborhoods, and public facilities are to be improved or restored to good condition by repair, renovation, conversion, remodeling, reconstruction, or the addition of needed improvements. A rehabilitation area as herein defined may or may not be within an area designated as an urban renewal area or a redevelopment area under the provisions of the Community Redevelopment Law of the State of California. Such an area shall consist of at least one block within which planned area inspection is necessary to promote the public safety, health, and welfare. Upon recommendation of the Director of Planning such areas may be designated by the Chief Administrative Officer.

Repairs. The reconstruction or renewal of any part of an existing building for the purpose of its maintenance.

Required. As required in this Code.

Rooming house. Same as Lodging house.

Sec. 203.21. Urban renewal. Urban renewal means undertakings and activities for the elimination and for the prevention of the development or spread of blighted areas, and may involve any redevelopment work or undertaking or any rehabilitation and conservation, or any combination or part of such undertaking or work.

Use. Use shall mean used or designed or intended to be used.

[fol. 111]

ARTICLE 5

ENFORCEMENT

Sec. 501. Enforcement.

(a) Within a rehabilitation area.

(b) Outside of a rehabilitation area.

Sec. 502. Order of vacation.

Sec. 503. Right to enter building.

Sec. 504. Stopping construction.

Sec. 505. Abatement or repairs.

(a) Within a rehabilitation area.

(b) Outside of a rehabilitation area—Director of Public Works.

(c) Outside of rehabilitation area—Director of Public Health.

Sec. 506. Posted notice, interference with.

Sec. 507. Penalty for violation.

Sec. 501. Enforcement.

(a) Within a rehabilitation area or conservation area. Within a rehabilitation area or conservation area the Director of Public Works through the Superintendent, shall administer and enforce all of the provisions of this Code. The Superintendent is hereby designated as the authorized representative of the Director of Public Works in such enforcement. The Superintendent is hereby authorized to call upon the Director of City Planning, the Director of [fol. 112] Public Health, the Chief of the Fire Department, the Chief of Police and all other city officers, employees, departments and bureaus to aid and assist him in such enforcement, and it shall then be their duty to enforce the provisions of this Code, and to perform such duties, as may come within their respective jurisdictions.

(b) Outside of a rehabilitation area or conservation area. Outside of a rehabilitation area or conservation area this Code shall be enforced as follows:

1. The Director of Public Works, in addition to his other enforcement duties, shall enforce all of the provisions of this Code pertaining to the construction, erection, remodeling, alteration, repairing, maintenance, use, moving and removal of buildings or parts thereof.

2. The Director of Public Health, in addition to his other enforcement duties, shall enforce all of the provisions of this Code, pertaining to maintenance, sanitation, ventilation, use and occupancy of residential buildings.

3. The Chief, Division of Fire Prevention and Investigation, in addition to his other enforcement duties, shall enforce all of the provisions of this Code pertaining to fire prevention, fire spread control, and the protection of persons and property from the hazard of fire, explosion or panic.

Sec. 502. Order of vacation. The Director of Public Works or Director of Public Health, within their respective

jurisdictions, shall give written notification of any order [fol. 113] to vacate to the Chief of Police who shall thereupon cause the same to be executed and enforced.

Sec. 503. Right to enter building. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

Sec. 504. Stopping construction. The Superintendent shall have the power to stop the construction, alterations or repairs or moving of any structure when, in his opinion, such work is being done in a dangerous, reckless or careless manner, or in violation of any of the provisions of this Code, or upon complaint by any City department or agency, and to order all work stopped. The work shall be stopped immediately and shall not be resumed without authorization from the Superintendent.

Sec. 505. Abatement or repair.

(a) Within a rehabilitation area or conservation area.

1. **General.** All buildings or portions thereof within a rehabilitation area or conservation area which are substandard as set forth in Article 6 of this Code are hereby declared to be public nuisances and shall be caused to be abated or repaired by the Director of Public Works as hereinafter provided.

2. **Complaints.** The Superintendent shall examine, or cause to be examined, every building or structure, or [fol. 114] portion thereof, coming within the provisions of subsection 1, next above, and if he finds it to be a substandard building, he shall file written complaint with the Director of Public Works which shall contain specific allegations setting forth the conditions complained of.

3. Procedure. Any building or portion thereof within a rehabilitation area or conservation area which is found by the Director of Public Works to be substandard as defined in Article 6 of this Code shall be repaired and rehabilitated, or vacated, demolished and removed in accordance with the procedure set forth in Section 804, subsections (c), (d), (e), (f), (g), (h) and (i) of the Building Code, and as otherwise provided in this Code. (See also Article 17.)

(b) Outside of a rehabilitation area or conservation area, Director of Public Works.

All dwellings or portions thereof outside of a rehabilitation area, or conservation area, which are substandard as set forth in Article 6 of this Code are hereby declared to be public nuisances and the Director of Public Works, upon finding that any building or portion thereof outside a rehabilitation area or conservation area is substandard shall cause it to be repaired and rehabilitated, or vacated, demolished and removed, in accordance with the procedure set forth in Section 804, subsections (b), (c), (d), (e), (f), (g), (h) and (i) of the Building Code.

Outside of a rehabilitation area or conservation area, the owner of a one or two family dwelling built under a lawful permit and subsequently maintained only for such [fol. 115] residential uses, may appeal to the Board of Examiners under the provisions of Section 806(a) of the Building Code on matters relating to the interpretations of the orders by the Director of Public Works as to compliance with the provisions of this Code which establishes the building as substandard. The Board of Examiners may exercise the powers granted to them in paragraphs 2 and 3 of subsection (a) of Section 806 in relation to variances from the provisions of this Code.

(c) Outside of rehabilitation area or conservation area, Director of Public Health.

All apartment houses and hotels, or portions thereof outside of a rehabilitation area or conservation area, which

are substandard because of reasons stated in Sections 602, 611 and 615 of this Code are hereby declared to be public nuisances, and the Director of Public Health, upon finding that any building or portion thereof outside a rehabilitation area or conservation area is substandard because of "inadequate sanitation" as defined in Sections 602, 611 and 615 of this Code shall cause it to be repaired and rehabilitated, or vacated, demolished and removed, in accordance with the procedure set forth in Sections 596 to 600 of the Health Code and this Code.

Sec. 506. Posted notices, interference with. It shall be unlawful for any person to interfere with the posting of any notice provided for in this Code, or to tear down or mutilate any such notice so posted in or upon any building [fol. 116] or premises by the Department of Public Works, the Department of Public Health or any other interested department or bureau.

Sec. 507. Penalty for violation. Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of, any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue. Any person who shall do any work in violation of any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code, and any person having charge of such work who shall permit it to be done, shall be liable to the penalty provided.

[fol. 117]

ARTICLE 6

SUBSTANDARD BUILDING

- Sec. 601. Standard building defined.
 - Sec. 602. Inadequate sanitation and safety.
 - Sec. 603. Structural unsoundness.
 - Sec. 604. Nuisance.
 - Sec. 605. Hazardous wiring—insufficient outlets.
 - Sec. 606. Hazardous plumbing.
 - Sec. 607. Hazardous mechanical equipment.
 - Sec. 608. Faulty weather protection.
 - Sec. 609. Fire nuisance.
 - Sec. 610. Faulty materials of construction.
 - Sec. 611. Hazardous or insanitary premises.
 - Sec. 612. Inadequate maintenance.
 - Sec. 613. Inadequate exits.
 - Sec. 614. Inadequate fire protection or fire fighting equipment.
 - Sec. 615. Improper occupancy.
-

Sec. 601. Substandard building defined. Any residential building or portion thereof including any dwelling unit, guest room or suite of rooms, or the premises on which the same is located, in which there exists any of the conditions enumerated in this Article to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants thereof shall be deemed and hereby is declared to be a substandard building.

[fol. 118] Buildings built under, and in full compliance with, the codes in force at the time of construction or alteration of the building and that have been properly maintained and used for only such use as originally permitted, shall be exempt from the declaration as substandard buildings insofar as paragraph (i) of Section 602 applies.

Sec. 602. Inadequate sanitation and safety, including:

(a) Lack of, or improper water closet, lavatory, bath tub or shower in a dwelling unit.

(b) Lack of, or improper water closets, lavatories, and bath tubs or showers per number of guests in an hotel.

(c) Lack of, or improper kitchen sink in a dwelling unit.

(d) Lack of hot and cold running water to plumbing fixtures in an hotel or lodging house.

(e) Lack of hot and cold running water to plumbing fixtures in a dwelling unit.

(f) Lack of adequate heating facilities or improper operation thereof.

(g) Lack of, or improper operation of required ventilating equipment.

(h) Lack of minimum amounts of natural light and ventilation required by this Code.

(i) Room and space dimensions less than required by this Code.

(j) Lack of required electrical illumination.

[fol. 119] (k) Dampness of habitable rooms.

(l) Infestation of insects, vermin or rodents.

(m) General dilapidation or improper maintenance creating an unsafe condition.

(n) Lack of connection to required sewage disposal system.

(o) Lack of adequate garbage and rubbish storage and removal facilities.

Sec. 603. Structural unsoundness. All structural elements that do not conform with all applicable laws in effect at the time of installation or the laws in effect at the time of any subsequent extensive alterations or reconstruction, or those which have not been maintained in good and safe condition. It shall include the following:

- (a) Deteriorated or inadequate foundations.
- (b) Defective or deteriorated flooring or floor supports.
- (c) Flooring or floor supports of insufficient size to carry imposed loads with safety.
- (d) Members of walls, partitions, or other vertical supports that split, lean, list or buckle due to defective material or deterioration.
- (e) Members of walls, partitions, or other vertical supports that are of insufficient size to carry imposed loads with safety.
- (f) Members of ceilings, roofs, ceiling and roof supports or other horizontal members which sag, split, or buckle due to defective material or deterioration.
- [fol. 120] (g) Members of ceilings, roofs, ceiling and roof supports, or other horizontal members that are of insufficient size to carry imposed loads with safety.
- (h) Fireplaces or chimneys which list, bulge, or settle, due to defective material or deterioration.
- (i) Fireplaces or chimneys which are of insufficient size or strength to carry imposed loads with safety.

Sec. 604. Nuisance. Any nuisance as defined in this Code. (See also Section 203.14.)

Sec. 605. Hazardous wiring—Insufficient outlets.

(a) All wiring except that which conformed with all applicable laws in effect at the time of installation or the laws in effect at the time of any subsequent extensive alterations and which has been maintained in good condition and is being used in a safe manner.

(b) Habitable rooms and kitchens with insufficient number of electrical convenience outlets as required by Section 708 of this Code.

Sec. 606. Hazardous plumbing. All plumbing except that which conformed with all applicable laws in effect at the time of installation or the laws in effect at the time of any subsequent extensive alterations and which has been maintained in good condition and which is free of cross connections and siphonage between fixtures.

Sec. 607. Hazardous mechanical equipment. All mechanical equipment, including vents, except that which conformed [fol. 121] with all applicable laws in effect at the time of installation or the laws in effect at the time of any subsequent extensive alterations and which has been maintained in good and safe condition.

Sec. 608. Faulty weather protection.

(a) Deteriorated, crumbling or loose plaster.

(b) Deteriorated or ineffective waterproofing or weather protection of exterior walls, roof, foundations, or floors, including broken windows or doors.

(c) Broken, rotted, split, or deteriorated exterior wall or roof covering.

Sec. 609. Fire hazard or nuisance. Means anything or any act which increases or may cause an increase of the hazard or menace of fire to a greater degree than that customarily recognized as normal by persons in the public service of preventing, suppressing, or extinguishing fire; or which may obstruct, delay, or hinder, or may become the

cause of an obstruction, a delay, or a hindrance to the prevention, suppression, or extinguishment of fire.

Sec. 610. Faulty materials of construction. All materials of construction except those which are specifically allowed or approved by the Building Code, and which have been adequately maintained in good and safe condition.

Sec. 611. Hazardous or insanitary premises. Those premises on which an accumulation of weeds, vegetation, junk, dead organic matter, debris, garbage, effal, rat har- [fol. 122] borages, stagnant water, combustible materials, and similar materials or conditions, constitute fire, health, or safety hazards.

Sec. 612. Inadequate maintenance. Any building or portion thereof which is determined to be an unsafe building in accordance with Section 804(a) of the Building Code.

Sec. 613. Inadequate exits. All buildings or portions thereof not provided with adequate exit facilities as required by this Code. When it is determined by the Superintendent and Bureau of Fire Prevention and Public Safety an unsafe condition exists through lack of or improper location of exits, additional exits may be required to be installed as set forth in the Building Code.

Sec. 614. Inadequate fire protection or fire-fighting equipment. All buildings or portions thereof which are not provided with the fire-resistive construction or fire-extinguishing systems or equipment required by this Code.

Sec. 615. Improper occupancy. All buildings or portions thereof occupied for living, sleeping, cooking or eating purposes which were not designed or intended to be used for such occupancies.

[fol. 123]

ARTICLE 16

MAINTENANCE, SANITATION AND REPAIR

Sec. 1601. Painting.

Sec. 1602. Courts and shafts.

Sec. 1603. Wallpaper.

Sec. 1604. Garbage receptacles.

Sec. 1605. Garbage receptacle compartment.

Sec. 1606. Automatic sprinklers.

Sec. 1607. Sanitation.

Sec. 1608. Deposit of rubbish, etc.

Sec. 1609. Bedding.

Sec. 1610. Towels.

Sec. 1611. Dangerous articles.

Sec. 1612. Caretaker.

Sec. 1613. Artificial light.

Sec. 1601. Painting. The walls and ceiling of every sleeping room in an apartment house or hotel, unless there is sufficient natural light to permit a person to read in any part of the room during the day, shall be painted, or papered with a light-colored material. The paint, or paper shall be applied as often as may be necessary to maintain the walls and ceiling in a light color and clean and free from vermin.

Sec. 1602. Courts and shafts. Unless built of light-colored materials, the walls of courts and shafts shall be [fol. 124] painted in a light color. The paint shall be ap-

plied as often as may be necessary to maintain the walls in a light color.

Sec. 1603. Wallpaper. Not more than two thicknesses of wallpaper shall be placed upon any wall, partition, or ceiling of any room in any apartment house or hotel. If any wall, partition, or ceiling with two thicknesses of wallpaper in any such room is to be repapered, the old wallpaper shall be first removed. Painting over wallpaper is permissible.

Sec. 1604. Garbage receptacles. Such number of tight metal receptacles with close-fitting metal covers for garbage, refuse, ashes, and rubbish as may be considered necessary by the enforcement agency, or an approved garbage chute or shaft, shall be provided for every building. Each receptacle, chute, or shaft shall be kept in a clean condition by the following persons:

1. In the case of a receptacle in an apartment house or dwelling, by the occupants or tenants of the building.
2. In the case of a receptacle in an hotel, by the owner or person in charge of the hotel.
3. In the case of a chute or shaft in any building, by the person in charge or in control of the building.

Sec. 1605. Garbage receptacle compartment. Every closet or compartment in a building used for storing a garbage receptacle shall be lined on all its sides and on the inside of all its doors with galvanized iron, with all joints made tight.

[fol. 125] Sec. 1606. Automatic sprinklers. Standard automatic sprinklers shall be installed in:

1. All garbage and trash chutes.
2. All laundry chutes except for dwellings.
3. All garbage, trash and soiled linen rooms or compartments.

Sec. 1607. Sanitation. Each room, hallway, passage-way, stairway, wall, partition, ceiling, floor, skylight, glass window, door, carpet, rug, matting, window curtain, water-closet compartment or room, toilet room, bathroom, slop-sink room, wash room, plumbing fixture, drain, roof, closet, cellar, basement, yard, court, lot, and the premises of every building shall be kept in every part clean, sanitary, and free from all accumulation of debris, filth, rubbish, garbage, vermin, and other offensive matter.

Sec. 1608. Deposit of rubbish, etc. No person shall do, or permit or cause another person to do, any of the following:

1. Deposit any swill, garbage, bottles, ashes, cans, or other improper substances in, or in any way obstruct, any water-closet, sink, slop hopper, bathtub, shower, catch-basin, or plumbing fixture connection or drain.

2. Put any filth, urine, or foul matter in any place other than the place provided for it.

3. Keep any filth, urine, or other foul matter in any room, or elsewhere in or about the premises, of any building [fol. 126] ing for such length of time as will result in the creation of a nuisance.

Sec. 1609. Bedding. In every apartment house or hotel every part of every bed, including the mattress, sheets, blankets, and bedding, shall be kept in a clean, dry and sanitary condition, free from filth, urine, or other foul matter, and from the infestation of lice, bedbugs, or other insects. The bed linen of a bed in an hotel shall be changed as often as a new guest occupies the bed.

Sec. 1610. Towels. No roller or public towel shall be kept or maintained in an hotel for common use.

Sec. 1611. Dangerous articles. Neither any article that is dangerous nor detrimental to life or to the health of the occupants; nor any feed, hay, straw, excelsior, cotton, paper

stock, rags, junk, or any material that may create a fire hazard, shall be kept, stored or handled in any part of an apartment house or hotel, or the lot on which such building is situated, except upon a written permit obtained from the officer or agency authorized by law to issue the permit. Every permit shall be made in duplicate, and a copy shall remain on file in the office of the officer or agency issuing it. Every filed copy constitutes a public record.

Sec. 1612. Caretaker. A janitor, housekeeper, or other responsible person shall reside upon the premises and shall have charge of every apartment house in which there are [fol. 127] sixteen or more apartments, and of every hotel in which there are twelve or more guest rooms, in the event that the owner of any such apartment house or hotel does not reside upon said premises. If the owner does not reside upon the premises of any apartment house in which there are more than four but less than sixteen apartments, a notice stating his name and address, or the name and address of his agent in charge of the apartment house, shall be posted in a conspicuous place on the premises.

Sec. 1613. Artificial light. In every apartment house and in every hotel there shall be installed and kept burning throughout the year artificial light sufficient in volume to illuminate properly every public hallway, passageway, public stairway, fire escape egress, elevator, public water closet compartment, or toilet room, in any part of which there is insufficient natural light to permit a person to read.

[fol. 128]

ARTICLE 17

HOUSING APPEALS BOARD

- Sec. 1701. Establishment.
- Sec. 1702. Membership.
- Sec. 1703. Powers of the Board.
- Sec. 1704. Procedure.
- Sec. 1705. Quorum.
- Sec. 1706. Appeals.
- Sec. 1707. Hearings.
- Sec. 1708. Compensation.

Sec. 1701. Establishment. There is hereby established a Housing Appeals Board consisting of five members who are residents of the City and County of San Francisco and who are qualified by training and experience to pass upon matters pertaining to housing and the health, safety and welfare of the public. None of the members, except the ex-officio members, shall be a public employee.

Sec. 1702. Membership. The members of the Board shall be appointed by the Chief Administrative Officer, and each member shall hold office for four years or until his successor is qualified and appointed, provided however, that those first appointed shall so classify themselves by lot that their several terms shall expire two at the end of one year and one each at the end of two, three and four years respectively, from the date of appointment of the original Board.

[fol. 129] The following shall constitute ex-officio members of the Board without vote: Director of Planning, the Coordinator or the Associate Coordinator of Urban Renewal.

The Urban Renewal Analyst of the Bureau of Building Inspection shall act as Secretary to the Board.

Sec. 1703. Powers of the Board. The Board shall have the power to hear and decide appeals from orders of condemnation or abatement after public hearing, by the Director of Public Works or the Director of Public Health, as the case may be, made pursuant to Section 505 of this Code.

The Board may affirm, modify or reverse such orders provided that the public health, safety and welfare is secured and substantial justice done most nearly in accordance with the intent and purpose of this Code.

Sec. 1704. Procedure. The Board shall establish reasonable rules and regulations for its own procedures consistent with the provisions of this Code and the City Charter. The Board, by majority vote, shall choose its officers other than the Secretary.

Sec. 1705. Quorum. Four members of the Board shall constitute a quorum. Any action of the Board shall require the concurrence of not less than three members. No member of the Board shall pass upon any case of which he or any corporation of which he is a shareholder, is interested.

[fol. 130] Sec. 1706. Appeals. Any person may appeal from orders of condemnation, or abatement after public hearing by the Director of Public Works or Director of Public Health, as the case may be, made pursuant to Section 505 of this Code and shall, at the hearings provided for in Section 505 of this Code, be apprised of his right of appeal to the Housing Appeals Board provided the appeal is made in writing and filed with the Secretary within ten days after such orders of the Director of Public Works or Director of Public Health, as the case may be.

Sec. 1707. Hearings. Hearings of the Board shall be held at the call of the Secretary of the Board and at such times as the Board may determine. All hearings of the

Board shall be public hearings. The Board shall fix the time and place of hearing, not less than five days or more than ten days after the filing of the appeal and shall act on such appeal not later than thirty days after the date on which appeal was filed with the Board. The Board shall submit its findings and decision to the appellant and the Director of Public Works or the Director of Public Health. If the Board has not acted within the time prescribed in this section, the orders of the Director of Public Works or the Director of Public Health, as the case may be, become immediately effective.

The Board shall hear the appellant, a representative of the department from whose action the appeal is taken and other interested parties.

[fol. 131] Sec. 1708. Compensation. The members of this Board shall receive no compensation but shall be allowed necessary actual travel and other expenses when the interest of the City shall require it but in each case, only if and when the Board of Supervisors shall have first specifically authorized the purpose and expenditures involved.

[fol. 132] SUPREME COURT OF THE UNITED STATES

No. 92, October Term, 1966

ROLAND CAMARA, Appellant,

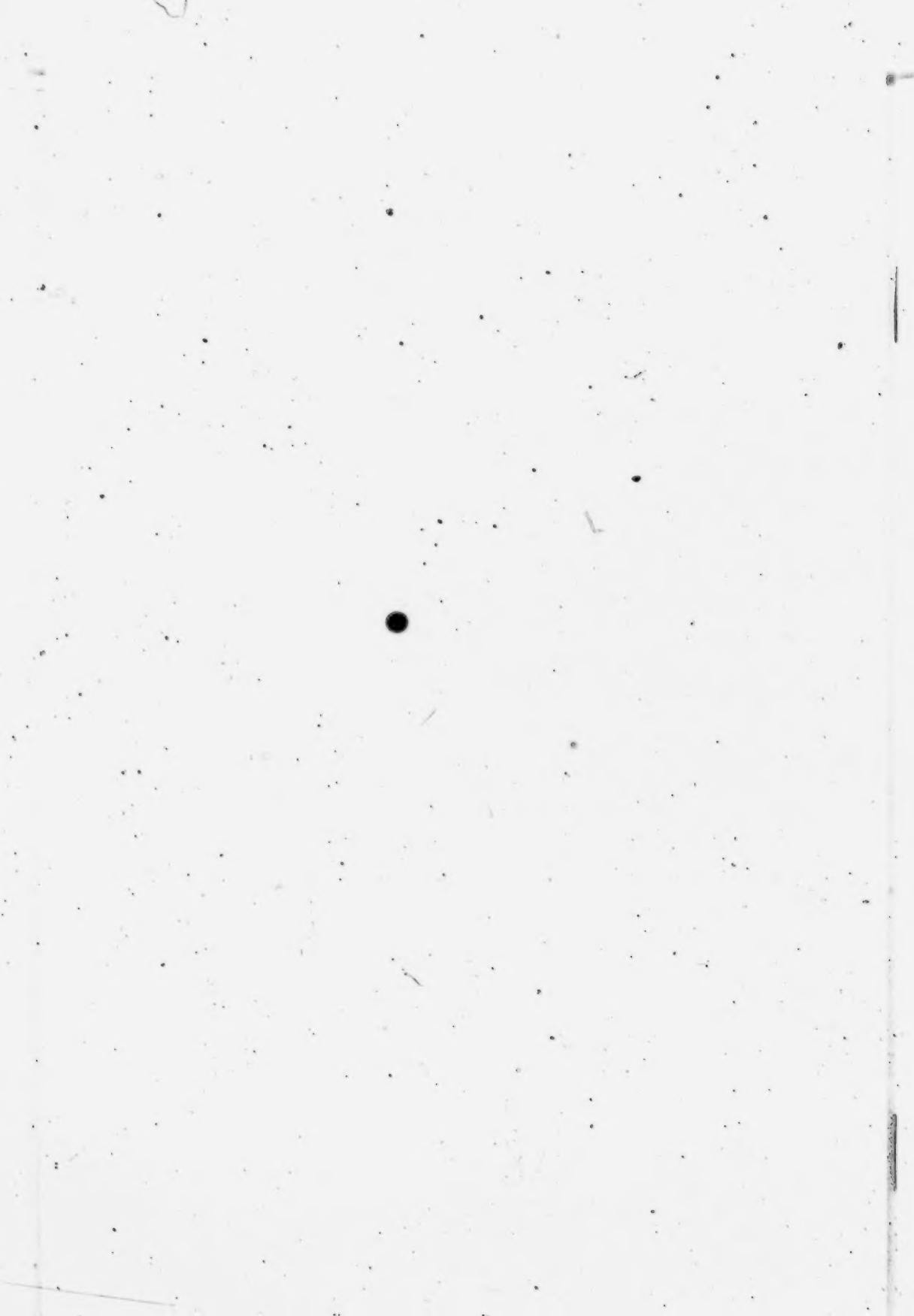
v.

MUNICIPAL COURT OF THE CITY AND COUNTY OF
SAN FRANCISCO.

Appeal from the District Court of Appeal of the State
of California, First Appellate District.

ORDER NOTING PROBABLE JURISDICTION—October 10, 1966

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable jurisdic-
tion is noted and the case is placed on the summary
calendar.



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No.

~~1199~~

92

MAR 21 1968

JOHN F. DAVIS, CLERK

ROLAND CAMARA,

Appellant,

vs.

MUNICIPAL COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO,

Appellee,

STATE OF CALIFORNIA,

Real Party in Interest.

On Appeal from the Judgment of the District Court of Appeal,
State of California, First Appellate District

JURISDICTIONAL STATEMENT

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1965

No.

ROLAND CAMARA,

Appellant,

vs.

MUNICIPAL COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO,

Appellee,

STATE OF CALIFORNIA,

Real Party in Interest.

On Appeal from the Judgment of the District Court of Appeal,
State of California, First Appellate District

JURISDICTIONAL STATEMENT

Appellant appeals from the decision of the District Court of Appeal of the State of California, filed September 22, 1965, affirming the order of the Superior Court, which refused to prohibit the Municipal Court of the City and County of San Francisco from proceeding to try appellant on a criminal charge under ordinances which appellant charged violated the United States Constitution. Pending this disposition of this appeal, the District Court of Appeal has stayed the issuance of its remittitur and appellant has not

been brought to trial. The criminal charge is still pending in the Municipal Court but the decision of the District Court of Appeal will be conclusive in California on the question of its constitutional sufficiency.

This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court of Appeal is reported in 237 Adv. Cal. App. 136, 46 Cal. Rptr. 585 (1965), and is reproduced in Appendix A hereto. The order of the Superior Court denying the writ of prohibition is unreported and is reproduced in Appendix B hereto.

JURISDICTION

The order of the District Court of Appeal was filed on September 22, 1965. A timely petition for hearing before the Supreme Court of California was filed on October 28, 1965, and denied on November 16, 1965, with Justices Peters and Peek voting for a hearing. Notice of appeal was filed in the District Court of Appeal on December 20, 1965. Pursuant to Rule 13 of the Rules of the Supreme Court of the United States, the District Court of Appeal enlarged the time for appellant to docket his case to and including March 21, 1966.

The jurisdiction of the Supreme Court of the United States, to review the decision below is conferred by Title 28, United States Code, Section 1257 (2).

STATUTES INVOLVED

Sections 503 and 507 of the San Francisco Municipal Housing Code are reproduced in Appendix C hereto.

QUESTIONS PRESENTED

I

Whether Section 503 of the Housing Code of the City and County of San Francisco, authorizing City employees to inspect private dwellings such as appellant's without warrant or probable cause for such inspections, and Section 507 of the Housing Code making refusal of such inspections a crime, are unconstitutional as authorizing unreasonable searches in violation of the Fourth and Fourteenth Amendments.

II

Whether Sections 503 and 507 of the Housing Code violate the First, Fourth, Fifth, Ninth and Fourteenth Amendments by allowing a search for evidence without warrant, arrest or emergency.

STATEMENT

Section 503 of the San Francisco Municipal Housing Code (Appendix C) authorizes city employees in the performance of their duties at reasonable times

to enter any building, structure or premises in San Francisco. Section 507 (Appendix C) makes it a criminal act to resist or oppose any provision of the Housing Code. Neither a warrant nor probable cause is necessary to allow a city employee to demand entry into one's home under Section 503. And if a resident refuses entry to the city employee into his home, the resident faces a criminal charge under Section 507 despite the absence of either a warrant or probable cause.

Appellant is charged in the Municipal Court with a misdemeanor on the basis of a written complaint that on November 22, 1963, he violated Section 507 by refusing a public health inspector entry into his dwelling for the purpose of making an inspection under the provisions of Section 503. (C.T. 7-8.)

Appellant applied for a writ of prohibition in the Superior Court and in doing so raised the constitutional issues involved in this appeal. (C.T. 6, 15-21.) An alternative writ of prohibition was issued requiring the Municipal Court to show cause why the prosecution should not be prohibited. (C.T. 21-22.) The issues raised by this appeal were argued orally at the hearing for the permanent writ of prohibition. (R.T. 2 et seq.) The application was decided adversely to appellant by the trial Court. The permanent writ was denied and the alternative writ was dissolved on the express ground that section 503 was not unconstitutional. (Appendix B; C.T. 37.) An appeal from the order of the trial Court was taken to the District Court of Appeal. The latter Court affirmed the deci-

sion of the Superior Court and in doing so expressly ruled that the ordinances involved did not violate the Fourteenth or Fourth Amendments. (Appendix A.) A petition for a hearing before the Supreme Court of California, raising these constitutional issues, was denied, with two Justices dissenting.¹

On November 6, 1963, Inspector Nall of the Division of Housing Inspection of the Department of Public Health of San Francisco entered the premises at 225 Jones Street, an apartment house. The purpose of his presence was to make a routine annual inspection of apartment houses for the purposes of licensing and issuing a permit of occupancy.² Nall learned that appellant leased the store on the ground floor of the building and lived in the rear. Nall questioned appellant, who readily admitted such occupancy. However, appellant declined to allow Nall to inspect the residence portion of the premises. Nall did not have a warrant or written complaint. (C.T. 3-4, 25-26.)

Nall returned to the premises on November 8, 1965, and appellant again declined to allow him entry to inspect. (C.T. 26.)

¹Appellant had previously filed a demurrer to the complaint on the sole ground that the pertinent provisions of the Municipal Housing Code were unconstitutional. (C.T. 10.) The demurrer was overruled by the Municipal Court and appellant was required to enter his plea. The trial of the case is awaiting the outcome of this proceeding and it is conceded that if Section 503 of the Housing Code is not unconstitutional, appellant has no defense. (App. A.)

²These facts are those pleaded in the Petition for Writ of Prohibition (C.T. 3 et seq.) and the Answer to the petition (C.T. 24 et seq.). Only those facts admitted by Appellee (either expressly or by failure to deny) or alleged by Appellee are set forth in this Statement.

On November 22, 1963, Nall returned to the premises with Inspector John M. Reid. They did not have a warrant or written complaint. Reid told appellant that it was the responsibility of the Department of Public Health to inspect apartment houses annually for the purposes of licensing and issuing occupancy permits. He also informed appellant that the building where appellant lived could not have a dwelling on the ground floor and so it was illegal for appellant to occupy the ground floor as a residence. Reid again requested permission to inspect appellant's dwelling and appellant again declined to give permission to enter. (C.T. 4, 26-27.)

The inspectors did not have a warrant or written complaint on any of these occasions. At all times appellant readily admitted that he resided on the ground floor. No reason for inspecting appellant's residence was given other than his occupancy, which appellant admitted. No emergency was involved. There was ample time between November 6th and November 22nd to obtain a search warrant (if the situation required it) or to serve an eviction notice (if the law required it).³ But no; the inspectors demanded the right to enter and search.

Appellant was arrested on December 3, 1963, before any written complaint was filed. Finally on December 10, 1963, a complaint was filed (C.T. 7-8) charging a violation of Section 507 because of appellant's refusal

³Whether or not appellant's residence was in fact legal for occupancy is of no relevance here since, if it was illegal to occupy the ground floor as a residence (Answer, C.T. 24-25), nothing in the interior of appellant's apartment could change that fact.

on November 22, 1963, to allow an inspection of his home as authorized by Section 503.

THE QUESTIONS ARE SUBSTANTIAL

The questions in this case present the important constitutional issue of whether a man may be made a criminal for declining to allow an invasion of his home in the absence of a search warrant or probable cause, or even an emergency requiring immediate entry. An ordinance which sanctions searches under these circumstances—along with penalties for refusal—violates the protections granted against unreasonable searches and seizures under the Fourteenth and Fourth Amendments to the United States Constitution and has further implications impinging upon the rights reserved to the people under the First, Fifth and Ninth Amendments.

Although similar issues have been presented to this Court on at least two occasions (*Frank v. Maryland*, 359 U.S. 360 (1959); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960)), neither decision may be considered dispositive of the basic issues or of the case now brought before this Court. First, later decisions of this Court show that *Frank v. Maryland* is inconsistent with the freedoms sought to be protected by the Fourth Amendment. The improper restrictions of that decision on our constitutional protections should be corrected. Second, the decision below goes beyond the *Frank* case in curtailing the guarantees of the Fourteenth Amendment.

1. The decision in *Frank v. Maryland*, 359 U.S. 360 (1959), may not be considered final authority to determine the issue before the Court. In *Frank* the Court upheld a city ordinance which allowed a health inspector to search one's dwelling without a warrant upon probable cause to suspect a nuisance existed. The Court split 4-1-4 in upholding the conviction for refusing entry to the health inspector.

The main opinion of the *Frank* decision ruled that the thrust of the Fourth Amendment prohibiting unreasonable searches and seizures was directed toward implementing the provisions of the Fifth Amendment prohibiting self-incrimination in a criminal case. Therefore, since the attempted search by the health inspector was not a criminal matter, the protections of the Fourth Amendment as applicable to the States through the Fourteenth Amendment were not available. 359 U.S. at 365-66.

This restriction of the Fourth Amendment is hardly reconcilable with earlier pronouncements in this Court. In *Boyd v. United States*, 116 U.S. 616, 630 (1886), for example, the Court stated that the protections against unreasonable searches and seizures "apply to all invasions on the part of government and its employees of the sanctity of a man's home and the privacies of life." In *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298, 307 (1924), the Court carefully narrowed the investigating scope of a federal regulatory statute in order to avoid the violation of the Fourth Amendment. The Court in *Agnello v. United States*, 269 U.S. 20, 32 (1925), stated: "The

search of a private dwelling without a warrant is *in itself* unreasonable and abhorrent to our laws." (Emphasis added in each case.)⁴

When the *Frank* issue arose before this Court once again in *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960), in which a conviction was affirmed by an equally divided Court, four members of this Court expressed an unwillingness to be reconciled to *Frank* and viewed it as "the dubious pronouncement of a gravely divided Court." The *Frank* case was likened to "A single decision by a closely divided court, unsupported by the confirmation of time, (which) cannot check the course of adjudication here." *Id.* at 269 (Brennan, J.).

This dubiousness concerning *Frank* as a constitutional standard is well justified by later decisions in this Court. In *Marcus v. Property Search Warrant*, 367 U.S. 717, 724-29 (1961), it was pointed out that the illicit practices to be suppressed by the Fourth Amendment were not only the collection of evidence to be used to incriminate but also the suppression of public expression—a ground independent of the Fifth Amendment. In *Mapp v. Ohio*, 367 U.S. 643, 657 (1961), the Court remarked that the purpose of both the Fourth and Fifth Amendments, "complementary to, although not dependent upon, that of the other", is "to maintain inviolate large areas of personal privacy." Furthermore, in *Stanford v. Texas*, 379 U.S. 476 (1965), the Court once again reviewed the ante-

⁴See also *Nueslein v. District of Columbia*, 115 F.2d 690, 692-93 (D.C. Cir. 1940), for an early discussion of the distinctions between the Fourth and Fifth Amendments.

cedents and application of the Fourth Amendment (as applied through the Fourteenth Amendment) and reaffirmed that its broad purpose was to assure that the people of this Nation are "secure in their persons, houses, paper and effects." (379 U.S. at 481.) The Court did not limit this security to criminal matters only.⁵

The unsettled position of this issue in the Supreme Court allows attention to be drawn to the decision of the Court of Appeals of the District of Columbia in *District of Columbia v. Little*, 178 Fed. 2d 13 (1949), affirmed on other grounds, 339 U.S. 1. That case squarely rejected the contention that while a search to find criminal evidence must abide by the constitutional protections other searches are immune (*Id.* at 17):

"To say that a man suspected of a crime has a right to protection against search of his home, without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

The Court noted that the Fourth Amendment was a restriction of power, not a grant of power. The Fourth Amendment provides the only means by which the government can invade a person's home, that is, by means of a search warrant or without one at times when there is no opportunity to obtain one and an

⁵The Court in *Stanford* pointed out the abhorrence of writs of assistance anteceding the writing of our Constitution. Housing Code Section 503 provides a statutory writ of assistance. Reference should also be made to *Griswold v. Connecticut*, 381 U.S. 475, 14 L.Ed.2d 510 (1965), in which the Court gave constitutional protection to another aspect of the rights of security and privacy.

emergency requires immediate entry. Other searches are "unreasonable" and not authorized by the Constitution.

Two state Court decisions (besides the *Eaton* case and the instant case) have reached results differing from the *Little* case. *Givner v. State*, 210 Md. 484, 124 Atl. 2d 764 (1956); *St. Louis v. Evans*, 337 S.W. 2d 948 (Mo. 1960). *Givner* concerns the very practice upheld in the *Frank* case and is erroneous for the same reasons that *Frank* must be overruled. The *Eaton* and *Evans* cases go beyond *Frank*—by upholding ordinances that did not even require probable cause—but rely on *Frank* for authority.⁶ These cases were decided before the decisions of this Court in *Marcus, Mapp*, and *Stanford* rejecting the narrow interpretation of the Fourth Amendment as espoused by *Frank*. These state cases are dangerous shoals in the sea of constitutional protection.

The *Frank* decision was a 4-1-4 case. The four dissenters have expressed in the later *Eaton* case that they are not reconciled to the *Frank* case. The *Frank* case depends on a restrictive interpretation of the Fourth Amendment which is not supported by earlier decisions and which has been repudiated by later ones. In view of the unsettled position of the Court on the important issue of constitutional protection here presented, the question in this case is a substantial one.

⁶It should also be noted that in the *Evans* case the defendants were not occupants of the portion of the premises which the inspectors sought to enter. Consequently, the decision cannot be persuasive as to the issue now before this Court.

2. Even if the *Frank* case were considered settled, it would not be authority for the case at hand because the governmental invasion of the home sanctioned in this case is greater than that sanctioned in *Frank*. The ordinance in the *Frank* case contained a requirement of probable cause before a search could be made, and Justice Whittaker in concurring with the main opinion stated clearly that the ground for his concurrence was that the evidence showed probable cause of a health hazard as a support for the search. 359 U.S. at 373-74.

In the instant case the applicable ordinance, section 503, does not contain a requirement that the inspector have probable cause before he searches the premises. Hence even the smallest of protection for the resident is eliminated from the subject ordinance. Furthermore, on the facts there was no probable cause to support a search in this case. The investigation in this case was not to discover some undetermined health hazard. The investigation was to determine whether the ground floor of a particular apartment house was properly occupied. The health inspectors believed it was zoned for commercial occupancy. Appellant admitted to the inspectors that he was residing in the portion of the building which they believed was zoned for commercial use only. Hence the insistence of the inspectors to search the premises was not for the purpose of determining whether there was an emergency hazard or even whether the law was being violated, but was only a gratuitous desire to rigorously assert their privilege under Section 503. Certainly a majority of the Court in *Frank* would not have sanc-

tioned such an invasion of privacy—which served no public purpose.

3. It is avoiding the issue to justify a search under these circumstances without a warrant by referring to the necessity of officials to secure the public health in urban areas. Crime itself constitutes a hazard in urban areas and yet search warrants are required. As Justice Douglas stated in *Frank v. Maryland*, 359 U.S. 360, 382 (1959) (dissent):

“One invasion of privacy by an official of government can be as oppressive as another. Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements. * * *”

The privacy of one's home is given constitutional protection even in the face of the need for society to prevent the violation of law. The warrant issued by a magistrate is used “so that an objective mind might weigh the need to invade that privacy in order to enforce the law.” *McDonald v. United States*, 335 U.S. 451, 455 (1948); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). This protection must remain whether criminal laws or public health ordinances are involved. The administration of either type of law is subject to abuse. Indeed, a ruling such as the *Frank* case provides an easy means whereby criminal law enforcement agencies may circumvent the requirement of a search warrant.⁷

⁷Instances of abuse of administrative searches, including, the subversion of constitutional protections against illegal police activity through the cooperation of administrators and the police, are presented in several sources: E.g., *State v. Pettiford*, 28 U.S.

In conclusion, it is submitted that the decision in *Frank v. Maryland* can no longer—~~if it ever was~~—be considered dispositive of the issue before us. But that decision has succeeded in misleading several state courts of last resort and has left unwarranted authority in government agencies to violate the privacy of homes. The decision below, by upholding an ordinance which allows the search of one's home by a public official without probable cause or without a warrant even in the absence of an emergency, sanctions an unreasonable search of our homes in violation of the Fourteenth and Fourth Amendments. Certainly this raises a substantial federal question of great general importance.

March, 1966.

Respectfully submitted,

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Law Week 2286 (Dec. 22, 1959); Reich, "Midnight Welfare Searches and the Social Security Act," 72 Yale L.J. 1374 (1963); Lassen, *The History and Development of the Fourth Amendment to the United States Constitution*, 51 et seq. (1937); Comment, "State Health Inspections," 44 Minn. L. Rev. 513 (1960); Note, 25 Mo. L. Rev. 79 (1960).

(Appendices A, B and C Follow)

Appendix A

*In the District Court of Appeal
State of California
First Appellate District*

DIVISION TWO

1 Civil No. 22,128

Roland Camara,	}
Petitioner and Appellant,	
vs.	
The Municipal Court of the City and County of San Francisco,	
Respondent.	

(237 A.C.A. 136)

OPINION

This is an appeal from an order denying a writ of prohibition.

The Division of Housing Inspection of the Department of Public Health is required, under part III, section 86, of the San Francisco Municipal Code, to make an annual inspection of all San Francisco apartment houses for the purpose of licensing such apartment houses and issuing permits of occupancy.

On November 6, 1963, Inspector Nall visited the premises at 225 Jones Street for the purpose of making such an inspection, and was informed by the manager of said apartment building that the lessee of a ground floor rental unit (223 Jones), which was restricted to commercial use under an existing permit of occupancy, was using the leased premises as a residence and was living in the rear of his store. Nall then called on plaintiff, who admitted that he was living in the rear of his store, but refused to allow Nall to enter and inspect the premises. Two days later Nall returned and was again refused permission to inspect the premises. Plaintiff failed to appear on a citation issued by the district attorney, after which an inspector again went to plaintiff, informed him of the health department's duty to make an annual inspection of all San Francisco apartment houses, and further informed him that the existing permit of occupancy authorized commercial and not residential use of the ground floor unit leased by plaintiff. Plaintiff again refused to allow said premises to be inspected.

Plaintiff was subsequently arrested and charged with violating section 507 of the Housing Code of the City and County of San Francisco (hereinafter referred to as "Housing Code").

Plaintiff expressly concedes that he committed the offense proscribed by section 507 of the Housing Code and that his defense to prosecution for said charge is predicated solely upon the alleged unconstitutionality of section 503 of said code. Plaintiff asserts that

section 503 authorizes an unreasonable search and seizure, in violation of article I, section 19, of the California Constitution and the Fourth Amendment to the federal Constitution, as applied to the states through the Fourteenth Amendment.¹ Plaintiff also relies upon the privileges and immunities clauses of the Fourteenth Amendment.

Section 503 of the Housing Code provides as follows: "Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure or premises in the City to perform any duty imposed upon them by the Municipal Code."

Section 507 of the Housing Code provides in pertinent part that "[a]ny person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code . . . shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code . . ."

The question whether an ordinance such as section 503 of the Housing Code is vulnerable to attack upon

¹Although the petition also alleged, as above noted, that section 503 violated article I, section 1, of the California Constitution, plaintiff has apparently abandoned this point on appeal.

the constitutional grounds raised by plaintiff is one of first impression in this state. However, the constitutionality of similar regulations enacted in other jurisdictions has been challenged on several occasions and, in all but one instance, has been upheld.

We discuss first the only case which resulted in a finding of unconstitutionality, to wit: *District of Columbia v. Little* (D.C. Cir. 1949) 178 F.2d 13. This case was later affirmed on other than constitutional grounds (*District of Columbia v. Little* (1950) 339 U.S. 1 [70 S.Ct. 468, 94 L.Ed. 599].) We do so because the remaining cases to which we shall refer, consider and then decide adversely to the arguments of unconstitutionality supported by the *Little* decision. In *Little*, the court undertook to determine the validity of certain regulations of the District of Columbia which required owners and occupiers of premises to maintain them in a clean and wholesome condition, authorized health officials to examine any building supposed or reported to be in an unsanitary condition and denominated as a misdemeanor interference with an inspection. Defendant Little was convicted of hindering, obstructing and interfering with a health inspector in the performance of his duties upon a showing that she had refused to unlock the door of her private residence to a health inspector who was investigating a complaint that there was an accumulation of loose and uncovered garbage and trash in the halls and that certain persons residing in the house had failed to avail themselves of the toilet facilities. The conviction was subsequently re-

versed, the federal circuit court of appeals holding that the Fourth Amendment prohibited health officials without a warrant from invading a private home to inspect it, even though there was probable cause to believe that there existed within the dwelling a violation of a law designed to protect the health, safety or welfare of the public. The court expressly rejected the contention that the Fourth Amendment was premised upon and limited by the Fifth Amendment and was therefore inapplicable to regulations which only incidentally involved criminal charges and which were primarily designed to protect the public health.

A dissenting opinion by Judge Holtzoff took the position that the Fourth Amendment was applicable only to proceedings of a criminal character and that the right of inspection in the interest of public safety and health was essentially a civil matter to which any criminal prosecution was only incidental.

Upon appeal to the Supreme Court of the United States, Mr. Justice Black rendered the opinion of the court that respondent Little had not been guilty of "interference" under the controlling District regulation (*District of Columbia v. Little* (1950) 339 U.S. 1 [70 S.Ct. 468, 94 L.Ed. 599]). Accordingly, it was unnecessary to determine the validity of the ordinance involved.

We now discuss in order the four cases involving the constitutionality of ordinances similar to that involved herein; and in each of which, as we have noted, the *Little* case was considered at length. How-

ever, the reasoning of the *Little* case did not persuade any of the appellate courts concerned and in each case the ordinance was held a valid exercise of the police power.

The first case is *Givner v. State* (1956) 210 Md. 484 [124 A.2d 764], wherein the Maryland Court of Appeals upheld three Baltimore ordinances which authorized health, fire and building inspectors to enter upon premises during daylight hours for the purpose of conducting inspections to determine whether such premises complied with the applicable regulations and which imposed a fine upon an owner or occupier who refused to allow such inspection. Two of the ordinances, which were substantially identical with section 503 of the Housing Code, contained no requirement of probable cause to suspect the existence of a nuisance and authorized representatives of the building inspection engineer and the chief engineer of the fire department to enter "any building, structure or premises" during daylight hours "for the purpose of performing his duties" under the code.

Defendant Givner, who was convicted of violating these ordinances, contended on appeal that they were prohibited by the due process clause of the federal Constitution and by an article of the state Constitution which the court characterized as being *in pari materia* with the Fourth Amendment of the federal Constitution. After discussing the *Little* case at length, the court chose not to follow its reasoning and overruled the constitutional objections to the ordinances on the ground that the inspections or searches

authorized by said ordinances were not "unreasonable." Although the court expressed doubt that either the federal or state prohibitions against unreasonable searches and seizures could be deemed inapplicable in civil matters, the court nevertheless concluded that different standards of reasonableness applied to a search for evidence to prove guilt of a crime than to an inspection for the purpose of protecting the public health or safety. Since the inspections authorized by the ordinances under attack were of a routine nature, which were to be made at reasonable hours and were primarily for protective and not punitive purposes, they could not be deemed unreasonable and could lawfully be made without search warrant.

In *Frank v. Maryland* (1959) 359 U.S. 360 [79 S.Ct. 804, 3 L.Ed. 2d 877], the United States Supreme Court, in a five-to-four decision, upheld the validity of one of the three Baltimore inspection ordinances involved in the *Givner* case. However, the ordinance in question was the most narrowly drawn of the three and authorized the commissioner of health to demand entry to any house, cellar or enclosure, during daylight hours, only if he "shall have cause to suspect that a nuisance exists" therein. The ordinance imposed a \$20 fine upon any owner or occupier who refused or delayed to allow such entry and submit to the inspection.

Defendant Frank was convicted of violating said ordinance after he refused to allow an inspection by a health official who was acting upon a neighbor's complaint of rats and who had observed that the de-

fendant's house was in an extreme state of decay and that a large quantity of straw and debris containing rat feces was located at the rear of the house.

Frank's conviction was affirmed by the United States Supreme Court in a majority opinion delivered by Mr. Justice Frankfurter, with whom Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Stewart concurred (Mr. Justice Whittaker specially concurring by way of clarification of the rule adopted by the majority). The court concluded that although the right to be secure from an invasion of personal privacy was protected by the Fourth Amendment, as applied to the states through the Fourteenth Amendment, the primary purpose of the Fourth Amendment was to safeguard the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures. The court noted that under the Baltimore city code, an occupant who had failed to maintain a building in hygienic condition was notified to abate the substandard conditions and was subjected to criminal prosecution only in default of such correction. The attempted inspection of Frank's house was accordingly for the purpose of ascertaining evils to be corrected and not for the purpose of securing evidence upon which a criminal prosecution could be based. Since the Baltimore ordinance authorized such an inspection only during reasonable hours and upon valid grounds for suspicion of the existence of a nuisance, the court concluded that Frank's resistance could only have been based upon a denial of any official justification for entry to his home. Such right

was upon the periphery of the important interests safeguarded by the Fourth and Fourteenth Amendments and was outweighed by the city's vital need to maintain adequate standards of health.

Since the Baltimore ordinance, unlike section 503 of the Housing Code, contained a requirement of probable cause for an inspection, the majority opinion in the *Frank* case clearly does not establish the validity of section 503. However, the majority opinion in *Frank* does contain certain language indicating that an ordinance authorizing routine, periodic inspections, for which probable cause might obviously be lacking, would similarly be immune to constitutional attack. The court stated: "Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few." (*Frank v. Maryland, supra*, at p. 372.)

Mr. Justice Douglas, with whom Chief Justice Warren, Mr. Justice Black and Mr. Justice Brennan concurred, wrote a dissenting opinion in which he expressed the view that a health official was not entitled, under the Fourth and Fourteenth Amendments,

x

to enter a private dwelling without first having secured a warrant upon a showing of probable cause to make an inspection.

In *State ex rel. Eaton v. Price* (1958) 168 Ohio St. 123 [151 N.E.2d 523], a case decided one year prior to *Frank v. Maryland, supra*, the Ohio Supreme Court upheld the validity of a Dayton ordinance which was substantially identical with section 503 of the Housing Code in that it contained no requirement of probable cause and authorized the housing inspector to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises within the city "in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public." The ordinance required owners or occupants of such premises to allow entry for such inspection at any reasonable hour. Any person violating the ordinance was subject to fine, imprisonment, or both.

Defendant was convicted of violating said ordinance by refusing to admit a housing inspector to his premises.

The Ohio Supreme Court upheld the ordinance and the conviction was affirmed. The court concluded that the Fourth Amendment of the federal Constitution was inapplicable to the states and that the applicable provision of the state Constitution did not prohibit a reasonable search such as that authorized by the Dayton ordinance. The court, in so holding, commented at length upon the decision of the federal circuit court of appeals in *District of Columbia v.*

Little, supra, but chose to follow *Givner v. State, supra*, and the views expressed by the Holtzoff dissent in the *Little* case.

The decision in *Stat ex rel. Eaton v. Price, supra*, was appealed to the United States Supreme Court, which noted probable jurisdiction of the appeal, by a vote of four to four, less than one month after it had decided *Frank v. Maryland, supra*. (*Ohio ex rel. Eaton v. Price* (1959) 360 U.S. 246 [79 S.Ct. 978, 3 L.Ed.2d 1200].)² Since the United States Supreme Court was equally divided, the case was not taken over by that court and the judgment of the Ohio Supreme Court was not affected.

The most recent decision dealing with the validity of an inspection ordinance is *City of St. Louis v. Evans* (Mo. 1960) 337 S.W.2d 948. The ordinance in that case authorized the building commissioner or his authorized agent to enter any structure or portion thereof when necessary in the performance of duty at any time between 9 a.m. and 6 p.m. or at any time it was necessary in his opinion. The ordinance further provided that if the right of entry were denied, the official might invoke the aid of the police department in order to gain such entry. Another ordinance designated as a misdemeanor offense hindering, ob-

²Since Mr. Justice Stewart's father was a member of the Ohio Supreme Court and had participated in the decision in *State ex rel. Eaton v. Price, supra*, he disqualified himself from sitting on the case. (*Ohio ex rel. Eaton v. Price, supra*, at p. 249.) The four Justices who had dissented in *Frank v. Maryland, supra*, voted to note probable jurisdiction of the *Price* appeal, and the four who comprised the majority in *Frank* expressed the view that that case was completely controlling of the *Price* case. (*Ohio ex rel. Eaton v. Price, supra*.)

structing, resisting or otherwise interfering with a city officer in the discharge of his official duties. Defendants Evans and Hourigan, the caretaker and the owner of a rooming house, refused to allow a city building inspector to enter certain portions of the building to ascertain whether they were being used in accordance with an existing occupancy permit and persisted in such refusal even after the inspector had enlisted the aid of a police officer. The two defendants were subsequently charged with a violation of the ordinance. Although the trial court entered judgment dismissing the prosecution and discharging the defendants, said judgment was reversed by the Missouri Supreme Court, which held that neither of the above-mentioned ordinances violated the privileges and immunities, equal protection or due process clauses of the Fourteenth Amendment to the federal Constitution or certain provisions of the state Constitution which prohibited unreasonable searches, self-incrimination and double jeopardy. The court pointed out, however, that since neither Evans nor Hourigan resided in the portion of the premises which the inspector sought to enter, the facts presented no issue as to their right of personal privacy or private residence.

We are persuaded that the reasoning of the authorities upholding the constitutionality of this type of inspection statute should be followed by this court. As we have noted, with the sole exception of the federal circuit court of appeals which decided *District of Columbia v. Little*, *supra*, the constitutionality of ordinances similar to section 503 of the Housing Code

have been upheld. We believe that such a result is an eminently reasonable one and that it is urgent in this day of the megalopolis that citizens be protected from conditions deleterious to their health and welfare, and that this right to protection should not be deemed subordinate to the individual's right to resist any official infringement, however reasonable, upon the ground of absolute privacy of his dwelling.

The Housing Code, of which section 503 is a part, commences with section 101, wherein "[i]t is found and declared that there exist in the City and County of San Francisco substandard and insanitary residential buildings and dwelling units whose physical conditions and characteristics render them unfit or unsafe for human occupancy and habitation, and which conditions and characteristics are such as to be detrimental to or jeopardize the health, safety and welfare of their occupants and of the public."

"It is further found and declared that the existence of such substandard, insanitary, obsolete and deficient buildings and dwelling units threatens the physical, social and economic stability of sound residential buildings and areas, and of their supporting neighborhood facilities and institutions; necessitates disproportionate expenditures of public funds for remedial action; impairs the efficient and economical exercise of governmental powers and functions; and destroys the amenity of residential areas and neighborhoods and of the community as a whole.

"For these reasons it is hereby declared to be the policy of the City and County of San Francisco:

"1. That is in the public interest of the people of San Francisco to protect and promote the existence of sound and wholesome residential buildings, dwelling units and neighborhoods by the adoption and enforcement of such standards, regulations and procedures as will remedy the existence or prevent the development or creation of dangerous, substandard, insanitary or obsolete and deficient residential buildings and dwelling units. . . ."

The purpose of the Housing Code, as set forth in section 103, "is to provide minimum requirements for the protection of life, limb, health, property, safety, and welfare of the general public and the owners and occupants of residential buildings, erected or to be erected in San Francisco.

Section 503 of said code, which authorizes certain city officials to enter and inspect buildings and other structures within the city, requires that any such inspection be made in the course of official duty, at reasonable hours and only upon presentation of proper credentials.

If such inspection should result in a finding that any building or portion thereof is substandard, the owner is directed to remedy the defective condition, under section 505, and may appeal such order to the Housing Appeals Board, under section 1706. A penalty is imposed upon the owner, pursuant to section 507, only if he neglects or refuses to comply with the order of correction.

We conclude, from an examination of the above-quoted provisions, that section 503 is part of a regula-

tory scheme which is essentially civil rather than criminal in nature, inasmuch as that section creates a right of inspection which is limited in scope and may not be exercised under reasonable conditions.

The ordinance is thus no broader in scope than those upheld in *Givner v. State, supra*; *State ex rel. Eaton v. Price, supra*; and *City of St. Louis v. Evans, supra*; and plaintiff's constitutional objections must fail.³

The order appealed from is affirmed.

Shoemaker, P. J.

Agee, J., and Taylor, J., concurred.

Filed September 22, 1965.

Lawrence R. Elkington, Clerk.

³It may be noted that plaintiff places considerable emphasis upon the fact that the ordinance authorizes an inspection without any showing of probable cause. However, the facts in the present case fall short of establishing that the attempted inspection of plaintiff's apartment was not based upon such a showing. Although the petition alleged that the inspection was routine in nature and was not occasioned by any complaint concerning the premises, the answer directly controverts this allegation. Plaintiff thereafter elected to stand upon the assertion that the ordinance was unconstitutional on its face. The instant case is therefore factually indistinguishable in this respect from the *Givner*, *Price* and *Evans* cases.

Appendix B

In the Superior Court of the State of California
In and for the City and County of San Francisco

No. 540,686

Roland Camara,

Petitioner,

vs.

The Municipal Court of the City and
County of San Francisco,

Respondent,

The People of the State of California,
Real Party In Interest.

ORDER DENYING PETITION

The above-entitled matter came on regularly to be heard on the 5th day of March, 1964, petitioner, Roland Camara, appearing personally and by his attorney, Marshall Krause, and Frank W. Shaw appearing on behalf of respondent, and the Court having heard arguments in support of and in opposition to the petition, the Court now finds that Section 503 of the San Francisco Municipal Housing Code is not unconstitutional as alleged in said petition;

It is therefore ordered, that the petition is hereby denied and the alternative writ is hereby dissolved.

Dated: March 19, 1964.

Joseph Karesh

Judge of the Superior Court

Filed March 19, 1964,

Martin Mongan, Clerk.

By R. J. Hare,

Deputy Clerk.

Appendix C

EXCERPTS FROM THE SAN FRANCISCO HOUSING CODE

Sec. 503. Right to Enter Building. Authorized employees of the City Departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

Sec. 507. Penalty for Violation. Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment, not exceeding six months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue. * * *

FILED

JUN 21 1966

JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. ~~110~~ 92

ROLAND CAMARA,

Appellant,

VS.

MUNICIPAL COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO,

Appellee,

STATE OF CALIFORNIA,

Real Party in Interest.

On Appeal from the Judgment of the District Court of Appeal,
State of California, First Appellate District

MOTION TO DISMISS OR AFFIRM

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1965

No. 1139

ROLAND CAMARA,

Appellant,

VS.

MUNICIPAL COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO,

Appellee,

STATE OF CALIFORNIA,

Real Party in Interest.

On Appeal from the Judgment of the District Court of Appeal,
State of California, First Appellate District

MOTION TO DISMISS OR AFFIRM

Appellee and Real Party in Interest, pursuant to Rule 16 of the revised rules of the Supreme Court of the United States, hereby move this Court to dismiss this appeal or to affirm the judgment of the District Court of Appeal of the State of California, First

Appellate District, Division Two, on the grounds that the constitutional issue is uncertain and that the question presented is so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two, is reported in 237 A.C.A. 136, 46 Cal. Rptr. 585 (1965), and is reproduced in Appendix A of Appellant's Jurisdictional Statement.¹ Appellant's petition for a hearing by the Supreme Court of the State of California was denied November 16, 1965.

QUESTION PRESENTED

Whether the Fourth and Fourteenth Amendments make unconstitutional the sections of the San Francisco Municipal Housing Code providing that authorized employees under certain conditions may enter any premises to carry out the health and safety inspections authorized by the Municipal Code, and that failure to permit such entry is a misdemeanor.

STATEMENT OF THE CASE

The facts in this case are fully stated in the opinion of the District Court of Appeal.

¹On page xv of Appendix A, line 4 should be corrected to read, "may not be exercised under unreasonable conditions."

/

"The Division of Housing Inspection of the Department of Public Health is required, under part III, section 86, of the San Francisco Municipal Code, to make an annual inspection of all San Francisco apartment houses for the purpose of licensing such apartment houses and issuing permits of occupancy.

On November 6, 1963, Inspector Nall visited the premises at 225 Jones Street for the purpose of making such an inspection, and was informed by the manager of said apartment building that the lessee of a ground floor rental unit (223 Jones), which was restricted to commercial use under an existing permit of occupancy, was using the leased premises as a residence and was living in the rear of his store. Nall then called on plaintiff, who admitted that he was living in the rear of his store, but refused to allow Nall to enter and inspect the premises. Two days later Nall returned and was again refused permission to inspect the premises. Plaintiff failed to appear on a citation issued by the district attorney, after which an inspector again went to plaintiff, informed him of the health department's duty to make an annual inspection of all San Francisco apartment houses, and further informed him that the existing permit of occupancy authorized commercial and not residential use of the ground floor unit leased by plaintiff. Plaintiff again refused to allow said premises to be inspected.

Plaintiff was subsequently arrested and charged with violating section 507 of the Housing Code of the City and County of San Francisco (hereinafter referred to as 'Housing Code')."
Camara v. Municipal Court, 237 A.C.A. 136, 136-137 (1965).

Section 503 of the San Francisco Municipal Housing Code provides:

"Right to enter building. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

Section 507 of this code provides:

"Penalty for violation. Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue. Any person who shall do any work in violation of any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code, and any person having charge of such work who shall permit it to be done, shall be liable to the penalty provided."²

²Relevant sections of the San Francisco Housing Code are set forth in Appendix A.

There is no provision in the San Francisco Housing Code permitting forced entry by the inspector, nor is there any provision under which a search warrant could be obtained.³

SUMMARY OF APPELLEE'S ARGUMENT

Appellee contends that because the facts have not been fully developed and there are uncertainties as to both the precise question considered and the construction of the San Francisco ordinance, jurisdiction should be declined in this case.

If the question raised is considered on the basis of this record, it is unsubstantial because the prior decisions of this Court in *Frank v. Maryland*, 359 U.S. 360 (1959) and *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960) are controlling. Persuasive support

³Additionally there would be no grounds for the issuance of such a warrant under state law which provides:

"A search warrant may be issued upon any of the following grounds:

1. When the property was stolen or embezzled.
2. When the property or things were used as the means of committing a felony.
3. When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered.
4. When the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be."

Calif. Pen. Code § 1524.

for this conclusion is found in the three state decisions, in addition to the California decision below, which have considered similar ordinances and reached the same result.

The decision in *Frank v. Maryland*, reached after full consideration of a right to privacy not restricted to criminal matters, is entirely consistent with the Fourth and Fourteenth Amendments. The circumstances in the case at bar, similar to the other three state cases, present even stronger reasons than those in *Frank* for finding that a carefully circumscribed right to inspect, without obtaining a warrant, is reasonable and valid. The authority to inspect upheld by these cases is essential to protect those living in cities and to prevent the decay of the city itself. To impose the requirement of a prior search warrant would create both confusion and an intolerable burden on the Courts without achieving any more protection of the right to privacy than now exists.

ARGUMENT

I

**THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION
BECAUSE THE CONSTITUTIONAL ISSUE IS UNCERTAIN
AT THE PRESENT STAGE OF THE PROCEEDINGS.**

Even though the effect of the California judgment in this case is to permit further proceedings in the Municipal Court, the judgment is a final judgment for the purposes of Supreme Court jurisdiction on appeal. *Rescue Army v. Municipal Court*, 331 U.S.

549, 566 (1946). However, since there has been no trial on the merits there is no complete record of the facts and the constitutional issue is not

"in clean-cut and concrete form, unclouded by any serious problem of construction relating either to the terms of the questioned legislation or to its interpretation." *Id.* at 584.

Although the decision of the District Court of Appeal apparently considers only the constitutionality of the ordinance on its face, appellant also argues on this appeal that on the facts in this case, there was no probable cause to support a search (Jurisdictional Statement at 12).⁴

Additionally, the Court below in its opinion states:

"It may be noted that plaintiff places considerable emphasis upon the fact that the ordinance authorizes an inspection without any showing or probable cause. However, the facts in the present case fall short of establishing that the attempted inspection of plaintiff's apartment was not based upon such a showing. Although the petition alleged that the inspection was routine in nature and was not occasioned by any complaint concerning the premises, the answer directly controverts this allegation. Plaintiff thereafter elected to stand upon the assertion that the ordinance was unconstitutional on its face. The instant case is therefore factually indistinguishable in this respect from the *Givner, Price and Evans* cases." *Camara v. Municipal Court*, 237 A.C.A. 136, 145 n. 3 (1965), JS Appendix A at xv.

⁴Hereinafter cited as JS.

Thus, it would seem to be unclear whether or not the fact of the existence of probable cause was considered by the Court. If probable cause does exist, appellant has no grounds for his argument that the right to inspect was asserted without cause. If his attack is that the ordinance, which contains no explicit cause requirement, is unconstitutional on its face, the discussion of the facts relating to cause is irrelevant, but both appellant and the Court below refer to them.

Moreover, there has been no development of the fact that appellant's residence was involved, other than his self-serving "admission" and the hearsay statement of the manager. The portion of the building in question was apparently zoned for commercial occupancy. Thus, by the simple expedient of "admitting" he resided in his commercial premises, appellant, without further proof of his occupancy, seeks to block inspection of them. Facts may be produced in evidence which would show appellant does not, in fact, reside there, and has no standing to raise this issue. See, e.g., *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (dictum); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149-54 (1951) (concurring opinion).

In *Rescue Army*, this Court declined to exercise its jurisdiction where there were some uncertainties as to the state Court's construction of the ordinances involved, even though the appellant then had the burden of undergoing trial. The policy of "strict necessity in disposing of constitutional issues" followed

there should be applied to this case as well. Appellant can then, without prejudice, raise the issue when a fully developed record will permit a more precise determination of the questions involved. Applicable also to this case is the comment of Mr. Justice Black in *District of Columbia v. Little*, 339 U.S. 1, 3 (1950), which this Court decided on other than constitutional grounds:

"Neither the facts of this case nor the district law on which the prosecution rests, provide a basis for a sweeping determination of the Fourth Amendment's application to all these various types of investigations, inspections and searches. Yet a decision of the constitutional requirement for a search in this particular case might have far reaching and unexpected implications as to closely related questions not now before us."

II

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THIS APPEAL.

Although the precise question sought to be presented by this appeal has not been directly decided, the decision of this Court in *Frank v. Maryland*, 359 U.S. 360 (1959) is controlling in this case. In *Frank*, this Court upheld the constitutionality of an ordinance similar in most respects, but with the requirement that the inspector have cause to expect that a nuisance exists. Shortly after the decision in *Frank*, this Court had before it a case involving an ordinance nearly identical to the San Francisco ordinance. The

state Court decision holding the ordinance valid was affirmed by an equally divided Court. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960).⁵ The four justices voting for affirmance were of the opinion that *Frank* was controlling. *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 248 (1959).

Prior to the California decision now before this Court, the highest Courts of three states considered similar ordinances and reached the same result.

In *Givner v. State of Maryland*, 210 Md. 484, 124 A.2d 764 (1956), the Court of Appeals of Maryland held that an ordinance almost identical with section 503 was not unconstitutional in permitting an inspection without a search warrant. The Court concluded that an inspection by a health inspector is made in the exercise of lawful police power and that the need for combatting urban blight and the growth of slum conditions, as well as the need for enforcement of minimum housing standards for safety and sanitation, overrides any invasion of privacy which may be incurred by the inspection.

In *City of St. Louis v. Evans*, 377 S.W.2d 948 (Mo. 1960), the Supreme Court of Missouri followed *Givner* in holding that building and health inspectors had a right to enter pursuant to an ordinance similar to section 503. The St. Louis ordinance, in addition, permitted the official to invoke the aid of the police department to enforce his right of entry if denied. The Court found that prohibitions against unreason-

⁵It was noted in the dissenting opinion that the judgment is without force as precedent.

able searches and seizures do not prohibit reasonable searches, and while the Fourth Amendment is primarily designed to protect the individual in the sanctity and privacy of his home, books, papers, and property, it does not apply to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals and welfare, 337 S.W. 2d at 959.

The third case is that which was affirmed by the equally divided Court in *Ohio ex rel. Eaton v. Price*, *supra*. Considering an ordinance with terms nearly identical to those of section 503 of the San Francisco Housing Code, the Ohio Court held unanimously that defendant's conviction for refusing entry should be affirmed, on the ground that the provision for inspection in the exercise of the police power to protect the public health of the citizens of the City of Dayton was not an unreasonable search. *State v. Price*, 168 Ohio St. 123, 151 N.E. 2d 253, *aff'd*, *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960).

Appellant contends that *Frank* cannot be considered controlling because the decision below goes beyond *Frank* in curtailing the guarantees of the Fourth and Fourteenth Amendments and, if the attempt to distinguish *Frank* fails, then that decision should be overruled (JS 7). Neither contention has merit.

A. *Frank v. Maryland* Is Entirely Consistent With The Fourth And Fourteenth Amendments.

Appellant bases his claim of inconsistency on his assertion that the majority opinion in *Frank v. Mary-*

land restricts the protection of the Fourth and Fourteenth Amendments to criminal cases by holding that since the attempted search by the health inspector is not a criminal matter the protections of the amendments are not available (JS 8). This is not the basis for the holding of *Frank*.⁶ The majority opinion reviews the historic background of the Fourth Amendment and states that

“two protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection is self-protection; the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property.” 359 U.S. at 365.

The Court notes that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions that the great battle for fundamental liberty was fought. The opinion continues,

“While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogues in state constitutions, the

⁶It may well be, however, that the requirements of the Fourth Amendment, whether applied to the federal government, or to the states through the Fourteenth Amendment, are applicable only to searches which have a criminal conviction as their purpose and that a more extensive right to privacy is more appropriately protected under the general due process considerations of the Fifth and Fourteenth Amendments.

application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are of course not restricted within these historic bounds." *Id.* at 365-66.

The opinion thus recognizes a general right to be secure from official intrusion into personal privacy. The Court holds only that this right of privacy is subject to the public welfare in the circumstances before it.

The majority opinion considers the liberty which was asserted:

"The absolute right to refuse consent for an inspection designed and pursued solely for the protection of the community's health, even when the inspection is conducted with due regard for every convenience of time and place." 359 U.S. at 366.

It also considers the safeguards of the ordinance and concludes that the inspection touched

"at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion . . ." 359 U.S. at 367.

The Court then states the crucial factor to be considered: that the demand made on the individual by the inspector must be assessed in the light of the needs which have produced it. Balancing these needs, and the long history of the use of such inspections, the Court concludes that the Maryland statute does not violate due process. Such balancing can be the

only proper approach where such vital interests are concerned.

For support for his position, appellant calls attention to the case of *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), affirmed on other than constitutional grounds, 339 U.S. 1 (1950), which reversed a conviction for refusing entry to a health officer. (JS 10).

Little, however, was a two to one decision in the Circuit Court of Appeals and, when it reached the Supreme Court, was decided on other than constitutional grounds. In spite of the broad language in the majority opinion of the Court of Appeals regarding limitations on the right to make inspections, it should be noted that the statutes involved in the case required the occupant of any premises to keep them "clean and wholesome" and authorized the Health Officer to examine any building "supposed or reported to be in an unsanitary condition." 178 F.2d at 15, n. 3. The indefinite standard thus established is in contrast to the careful definitions of the San Francisco ordinances. See, *e.g.*, Arts. 6, 16.

The dissenting judge in *Little* would have upheld the ordinances. He observed that although the sanctity of the home was a fundamental private right protected by the Constitution, it was not an unqualified right but was subject to some limitations just as were the other personal rights safeguarded by the first Ten Amendments.

"The right of inspection in the interest of public safety and public health is one of these qualifications." 178 F.2d at 24-25.

Different standards must necessarily apply to inspections for health and safety than apply to searches for evidence relative to a criminal conviction. The safety inspection is not directed against the individual, but is solely for the purpose of correcting a condition which creates a danger for himself and for others. He is treated equally with all others in a similar situation and required only to conform to a uniformly applied safety standard. The inspector can only request entry at reasonable times and has no right to force entry if consent is refused. Both the purpose and the method of such inspection are in sharp contrast to the abrupt invasion involved in a search for criminal evidence. There is a vast difference between police entering without a warrant or probable cause to arrest in order to search a person and his private papers to obtain evidence to be used to take away his liberty, and a housing inspection for limited purposes, following a knock on the door and a polite request, at a reasonable time. The term "search" is inappropriately applied to such inspections.

- B. The Circumstances In The Case At Bar Present Stronger Reasons Than Those In Frank For Finding That Inspection Without A Prior Warrant Is Reasonable..**

In the dissenting opinion in *Frank*, Mr. Justice Douglas noted,

"Where considerations of health and safety are involved, the facts that would justify an entrance of 'probable cause' to make an inspection are clearly different from those that would justify such an inference when a criminal investigation

has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. . . . This is not to sanction synthetic search warrants but to recognize that the showing of probable cause in a health case may have quite different requirements than the one required in graver situations." 359 U.S. at 383.

Experience has indeed shown the need for such periodic inspections, but obtaining a search warrant prior to asserting the right to conduct this inspection would serve no useful purpose in safeguarding the privacy of the home. Moreover, such a requirement could make it impossible to carry on the programs attempting to safeguard and upgrade the lives of those confined by economics to the blighted or decaying areas of the cities.

1. Authority to inspect is essential to protect those living in cities and to prevent the decay of the city itself.

The policy of the City and County of San Francisco in adopting the Housing Code of which sections 503 and 507 are a part is stated in section 101 of the code. That section may be summarized in the statement that substandard and unsanitary residential buildings and dwelling units which are unfit or unsafe for human occupancy and habitation exist within the City and County of San Francisco, and that conditions and characteristics exist which are detrimental to and jeopardize the health, safety and welfare of the

occupants and the general public. The purpose of the code, expressed in section 103, is

"to provide minimum requirements for the protection of life, limb, health, property, safety, and welfare of the general public and the owners and occupants of residential buildings, erected or to be erected in San Francisco. . . ."

The code was adopted in 1958 as a necessary prerequisite to the city obtaining federal assistance for slum clearance.⁷ Enforcement of the Housing Code is the responsibility of different officials depending on whether the area to be inspected is within or without a rehabilitation or conservation area. These areas must consist of at least one block within which planned area inspection is necessary to promote the public safety, health, and welfare. See §§ 203.3, 203.18, San Francisco Housing Code.

"Planned area inspection" is the inspection of all residential buildings within the designated area for the purpose of determining and eliminating all violations of the code, and includes a study to determine whether conditions in the area involve aspects of urban renewal. § 203.16. Urban renewal includes undertakings and activities for the elimination and the prevention of the development or spread of blighted areas. § 203.21. The overriding policy is to assure compliance with a broad program of urban renewal and the upgrading of residential buildings in the City of San Francisco.

⁷See Title 1 of the Housing Act of 1956, Pub. L. No. 1020, 84th Cong. 2nd Sess. (Aug. 7, 1956), 70 Stat. 1091 (1956).

Possible health and safety hazards in a city apartment or other dwelling are not the occupant's business alone as they might be in an isolated country home. A fire started through the improper use or installation of heaters, or appliances could spread through an entire apartment building or city block, destroying both lives and property. An inspection of the entire premises under reasonable conditions is a minor infringement of the right of privacy but is a major safeguard of the right of all the tenants to be reasonably secure against conditions over which they have no control. This is particularly likely in appellant's case since, if he is in fact living in part of his store, he is cooking in an area of the building designed for commercial use, and not as a kitchen.

The compelling reason why health and safety inspections cannot depend on complaints or a showing of probable cause is seen clearly in the report of a test survey conducted by a grand jury in New York City in 1953. The grand jury was convened to investigate hazardous, unsanitary conditions in housing, and fifteen square blocks of housing in three representative areas of Brooklyn were surveyed. Prior to the survey, 567 housing division violations had been reported by complaint. The inspection survey revealed an actual total of 12,445 violations in the test area, many of them classed as "hazardous". Other New York City inspections indicated this ratio was not out of line. Grand Jury Presentment, "In the Matter of the Investigation of the Enforcement of any and all Laws Concerning Hazardous and Unsanitary Con-

ditions in Dwellings, etc.," Kings County Court, New York, Part 1, pages 6-8. (January 28, 1953), cited in Brief of the Member Municipalities of the National Institute of Municipal Law Officers as Amici Curiae, *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960, at 5. Thus, this survey disclosed twenty-two health and safety violations for every one violation for which there was a complaint. More persuasive evidence of the great need for a sound health and safety preventive program based upon periodic area-by-area inspections could hardly be found.

It is respectfully submitted that the dissenting opinions in both *Frank* and *Eaton* and the majority opinion of the Court of Appeals in the *Little* case have not squarely met the issue involved: How are these thousands of daily inspections, solely for the purpose of protecting the health of the public, to be conducted if the right to inspect is conditioned on a prior search warrant?

As justification for the imposition of a search warrant as a prerequisite for asserting the right to conduct a routine inspection, Mr. Justice Douglas cites the thousands of inspections made annually in Baltimore and the fact that the number of prosecutions for refusing to permit entry have averaged one per year. He then states:

"Submission by the overwhelming majority of the populace indicates there is no peril to the health program. One rebel a year (cf. Whyte, *The Organization Man*) is not too great a price to pay for maintaining our guarantee of civil rights in full vigor." 359 U.S. at 384.

While there may be only "one rebel a year" where officials have a right to inspect without a warrant, it cannot be said that such would be the case when there is no right to enter without a warrant. The enforcement of the program to preserve the public health and safety would, under this approach, totally collapse if any substantial number of citizens chose to enjoy this purported right.

2. Requiring a search warrant would serve no useful purpose in safeguarding the privacy of the home.

The dissenting opinions in both *Frank* and *Eaton* indicate that the purpose of obtaining a warrant is to insure that an objective mind will weigh the need to invade privacy to enforce the law. In a case based on a complaint, or on probable cause to believe a violation is taking place, there are at least facts and witnesses which the Court could consider in making a determination.⁸

In the case of the San Francisco ordinance, there has been a legislative determination that there is a need for annual inspections and planned area inspections where administrative agencies make an appropriate determination. There are, however, no additional "facts" relating to any individual situation which the

⁸This was noted by the majority in *Little*:

"The District lays great stress upon the fact that there was a complaint, succinct and definite. . . . [T]he fact of a complaint shows (1) that there is an identifiable informant who could be taken before a magistrate; (2) that the enforcement officers have no direct or personal knowledge of the alleged offense; and (3) that in all reasonable probability a search warrant would be procurable. These are reasons for getting a warrant not for failing to get one." *District of Columbia v. Little*, 178 F.2d 13, 18 (1949).

judge could weigh. It was pointed out by the dissenting judge in *Little*:

"Moreover, even if an Act providing for such search warrants should be placed upon the statute books, how can an inspector make a showing of probable cause as a basis for the issuance of a warrant for the purpose of an ordinary, routine examination? Regular periodic inspections are conducted for the purpose of making certain that laws relating to sanitation and safety are being observed. . . . If a search warrant were necessary for such recurring inspections, the requirement would amount to turning over the supervision of administration from the executive to the judicial branch of the Government, which, as the Supreme Court has observed in the past, would be a source of mischief and is contrary to the philosophy of our form of Government." 178 F.2d at 24.

What purpose is served, for example, in interposing a magistrate in the circumstance of a planned area inspection? The responsible agencies make an administrative determination, using their expertise in the field of planning and urban design, that an area can be preserved or rehabilitated. Essential to the program is the inspection of every building in the area. When an occupant asserts a "right" to refuse entry, if the official must then get a warrant, what does the magistrate do? If he must accept the administrative decision, he serves no function because there is no weighing of the need to invade privacy. Is this judicial seal of approval then good for the whole area, or must the official return for a new determination

on each refusal? If the judge is not merely a "rubber stamp", is he expert enough to make the final decision as to whether an area is to be rehabilitated, or whether periodic inspections are necessary? This would seem to be a determination more appropriately made by the agency with expertise in the field. If he does make this decision, what happens when the second occupant refuses to consent to entry, a different judge hears the case, and a different determination is made? A rehabilitation program can only succeed when the whole area is treated uniformly.

We contend that a requirement for a warrant in these circumstances would create far more problems than would be solved. The result would be both confusion and an enormous burden on the Courts, with no more protection of the right to privacy than now exists.

The right to enter under the San Francisco ordinance is carefully circumscribed: only authorized employees of city departments or agencies may enter; they may enter only upon presentation of proper credentials and only so far as may be necessary for the performance of the duties imposed upon them by the Municipal Code; they have the right to enter only at reasonable times; and most important, they have no power to force entry. The procedure followed is to try to persuade the party who refuses entry to agree to the inspection; failing that, the inspector's only remedy is the one followed in this case, that is, to seek a warrant of arrest from the District Attorney's Office for a violation of section 507.

The entire program is grounded on the concept that the public welfare is best served through the prevention of conditions resulting in hazards to health and safety. The code is designed primarily to serve this purpose, not to punish the violator. It is replete with provisions providing for notice of substandard conditions, permitting appeal to various officers, and requiring reports from the order of the official in charge. See, *e.g.* §§ 505(b); 1701-08. It is only when all other methods fail that legal action to compel compliance is undertaken.

Therefore it is apparent that a routine annual inspection pursuant to this carefully circumscribed ordinance presents a stronger case than *Frank* for a determination of reasonableness.⁹

This is not to say that any official has at any time, for any reason, the unrestricted right to enter a private home. The remote possibility of abuse by an inspector, however, should not determine whether or

⁹The possibility of this result is suggested in Mr. Justice Black's comment in *District of Columbia v. Little*, 339 U.S. 1, 3 (1950):

"At one extreme the district argues that the Fourth Amendment has no application whatever to inspections and investigations made by health officers; that to preserve the public health, officers may without judicial warrants enter premises, public buildings and private residences at any reasonable hour, with or without the owner's consent. At the opposite extreme, it is argued that no sanitary inspections can ever be made by health officers without a search warrant, except with a property owner's consent. Between these two extremes are suggestions that the Fourth Amendment requires search warrants to inspect premises where the object of inspections is to obtain evidence for criminal punishment or where there are conditions imminently dangerous to life and health, but that municipalities and other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants."

not an inspection conducted pursuant to his duty, and under reasonable conditions, is permitted by the Fourth and Fourteenth Amendments. Possible abuse of the right to make, without a warrant, a reasonable search incident to an arrest, for instance, has not led to a requirement that all searches for criminal evidence be conducted pursuant to a warrant. *Compare Agnello v. United States*, 269 U.S. 20 (1925), with *United States v. Rabinowitz*, 339 U.S. 56 (1950). There is even less reason for applying such a rule to safety inspections. Here, contrary to the case of a search pursuant to an arrest, there is no abrupt invasion of privacy. To this day, appellant's premises have not been inspected. Over the many years and thousands of inspections, few instances of attempted abuse by health inspectors have arisen. Rather, the efficacy of such programs is shown in the great strides made in the fields of public health and urban renewal.

In conclusion, the attempt by the City of San Francisco to preserve and improve the quality of its housing represents a valid exercise of the city's police power. To impose a requirement of a prior search warrant would make it nearly impossible to carry out the regular inspections vitally necessary for the success of the program. The nature of the obligation of the individual as a member of the public, and the purpose of the ordinance, solely to protect the public health, distinguish this kind of inspection from a search for criminal evidence: the liberty of the individual is not at stake, but the health and safety of the public is. It is surely not too much to ask that

each individual give up a small portion of his absolute privacy in order that all individuals may be secure.

The Constitution today must be a growing and flexible document, reflecting the problems and protections needed in an increasingly complex and interdependent society, and not a document of rigid absolutes unrelated to considerations of the needs of society and the nature of the individual interests concerned.

CONCLUSION

For these reasons, it is respectfully submitted that the judgment of the District Court of Appeal be affirmed, or in the alternative, that the appeal be dismissed.

Dated, San Francisco, California,
June 15, 1966.

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(Appendix A Follows)

Appendix A

CALIFORNIA PENAL CODE

§ 1524. [Grounds for issuance: From whom or where property may be taken.] A search warrant may be issued upon any of the following grounds:

1. When the property was stolen or embezzled.
2. When the property or things were used as the means of committing a felony.
3. When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered.
4. When the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be. [Enacted 1872; Am. Stats. 1899, p. 87; Stats. 1957, ch. 1884, § 1.]

SECTIONS FROM THE SAN FRANCISCO HOUSING CODE, CHAPTER XII OF SAN FRANCISCO MUNICIPAL CODE

Sec. 101. Declaration of Policy. It is found and declared that there exist in the City and County of San Francisco substandard and insanitary residential buildings and dwelling units whose physical conditions

and characteristics render them unfit or unsafe for human occupancy and habitation, and which conditions and characteristics are such as to be detrimental to or jeopardize the health, safety, and welfare of their occupants and of the public.

It is further found and declared that there exist in the City and County of San Francisco residential buildings and dwelling units which were legally constructed according to standards now generally recognized to be obsolete and deficient in terms of current, modern housing standards for construction, use, occupancy, light and ventilation and sanitary facilities. The continued existence of these obsolete and deficient residential buildings and dwelling units is detrimental to or jeopardizes the health, safety, and welfare of their occupants and of the public.

It is further found and declared that the existence of such substandard, insanitary, obsolete and deficient buildings and dwelling units threatens the physical, social and economic stability of sound residential buildings and areas, and of their supporting neighborhood facilities and institutions; necessitates disproportionate expenditures of public funds for remedial action; impairs the efficient and economical exercise of governmental powers and functions; and destroys the amenity of residential areas and neighborhoods and of the community as a whole.

For these reasons it is hereby declared to be the policy of the City and County of San Francisco:

1. That it is in the public interest of the people of San Francisco to protect and promote the existence of

sound and wholesome residential buildings, dwelling units and neighborhoods by the adoption and enforcement of such standards, regulations and procedures as will remedy the existence or prevent the development or creation of dangerous, substandard, insanitary or obsolete and deficient residential buildings and dwelling units.

2. That the adoption and enforcement of a Housing Code is a necessary municipal governmental function in the interest of the health, safety, and welfare of the people of San Francisco.

Sec. 103. Purpose. The purpose of this Code is to provide minimum requirements for the protection of life, limb, health, property, safety, and welfare of the general public and the owners and occupants of residential buildings, erected or to be erected in San Francisco. In case of any conflict between the provisions of this Code and the Municipal Code, the most restrictive shall govern.

Sec. 203.3. Ceiling. The undersurface of the overhead covering of a room.

Ceiling Height. The distance between the finished floor and the finished ceiling.

Cellar. Cellar means any portion of a building or structure with a ceiling any part of which is less than seven (7) feet above the actual adjoining ground levels.

Chief, Division of Fire Prevention and Investigation. The Chief Division of Fire Prevention and Investigation—City and County of San Francisco.

City and County. City and County of San Francisco.

Closet. A non-habitable space having less than the minimum required floor area or other legal requirements of a habitable room.

Conservation Area. Conservation area shall mean an area in the City and County which is to be protected from blighting influences and maintained in a safe and sound state or, in a declining area, improved and preserved from further deterioration. Such an area shall consist of at least one block within which planned area inspection is necessary to promote the public safety, health, and welfare. Upon recommendation of the Director of Planning such areas may be designated by the Chief Administrative Officer.

Court. Any space on a lot other than a yard which, from a point not more than two (2) feet above the floor line of the lowest story in the building on the lot in which there are windows from rooms abutting and served by the court, is open and unobstructed to the sky, except for projections permitted by this Code.

Outer Court. A court, one entire side or ends of which is bounded by a front yard, a rear yard, a side yard, a front of lot, a street, or a public alley.

Inner court. Any court which is not an outer court.

Sec. 203.16. Pantry. A space accessible to a dining room or kitchen for the storage of food, dishes or utensils.

Partition. An interior vertical separation running from floor to ceiling and dividing one part of an enclosure from another.

Person. Any person, firm, association, organization, partnership, business trust, corporation, company, municipal, state or federal agency, executors, administrators, successors, assigns or agents or their heirs.

Planned area inspection. Planned area inspection shall mean the inspection of all residential buildings within a rehabilitation area or conservation area for the purpose of determining all violations of this Code and the elimination of all such violations in accordance with this Code. It shall also mean a study to determine whether conditions in any area of the city involve aspects of urban renewal as defined in this Code.

Planning Code. The San Francisco City Planning Code, Chapter II, Part II, of the San Francisco Municipal Code.

Plumbing and Gas Appliance Code. The San Francisco Plumbing and Gas Appliance Code, Chapter VII, Part II, of the San Francisco Municipal Code.

Porch. A porch is a projection or appendage on the exterior of a building which has a roof, the ceiling height of which cannot be less than seven (7) feet. The roof may be supported on the porch floor structure, on an independent foundation, or be cantilevered from the building. Where one balcony is placed one story above another balcony, the construction constitutes a roofed porch.

Premises. Land including improvements or appurtenances or any part thereof.

Sec. 203.18. Rehabilitation area. Rehabilitation area shall mean an area of the City and County in which deteriorated structures, neighborhoods, and public facilities are to be improved or restored to good condition by repair, renovation, conversion, remodeling, reconstruction, or the addition of needed improvements. A rehabilitation area as herein defined may or may not be within an area designated as an urban renewal area or a redevelopment area under the provisions of the Community Redevelopment Law of the State of California. Such an area shall consist of at least one block within which planned area inspection is necessary to promote the public safety, health, and welfare. Upon recommendation of the Director of Planning such areas may be designated by the Chief Administrative Officer.

Repairs. The reconstruction or renewal of any part of an existing building for the purpose of its maintenance.

Required. As required in this Code.

Rooming house. Same as Lodging house.

Sec. 203.21. Urban renewal. Urban renewal means undertakings and activities for the elimination and for the prevention of the development or spread of blighted areas, and may involve any redevelopment work or undertaking or any rehabilitation and conservation, or any combination or part of such undertaking or work.

Use. Use shall mean used or designed or intended to be used.

ARTICLE 5 ENFORCEMENT

Sec. 501. Enforcement.

- (a) Within a rehabilitation area.
- (b) Outside of a rehabilitation area.

Sec. 502. Order of vacation.

Sec. 503. Right to enter building.

Sec. 504. Stopping construction.

Sec. 505. Abatement or repairs.

- (a) Within a rehabilitation area.
- (b) Outside of a rehabilitation area—
Director of Public Works.
- (c) Outside of rehabilitation area—
Director of Public Health.

Sec. 506. Posted notices, interference with.

Sec. 507. Penalty for violation.

Sec. 501. Enforcement.

(a) Within a rehabilitation area or conservation area. Within a rehabilitation area or conservation area the Director of Public Works through the Superintendent, shall administer and enforce all of the provisions of this Code. The Superintendent is hereby designated as the authorized representative of the Director of Public Works in such enforcement. The Superintendent is hereby authorized to call upon the Director of City Planning, the Director of Public

Health, the Chief of the Fire Department, the Chief of Police and all other city officers, employees, departments and bureaus to aid and assist him in such enforcement, and it shall then be their duty to enforce the provisions of this Code, and to perform such duties, as may come within their respective jurisdictions.

(b) Outside of a rehabilitation area or conservation area. Outside of a rehabilitation area or conservation area this Code shall be enforced as follows:

1. The Director of Public Works, in addition to his other enforcement duties, shall enforce all of the provisions of this Code pertaining to the construction, erection, remodeling, alteration, repairing, maintenance, use, moving and removal of buildings or parts thereof.

2. The Director of Public Health, in addition to his other enforcement duties, shall enforce all of the provisions of this Code, pertaining to maintenance, sanitation, ventilation, use and occupancy of residential buildings.

3. The Chief, Division of Fire Prevention and Investigation, in addition to his other enforcement duties, shall enforce all of the provisions of this Code pertaining to fire prevention, fire spread control, and the protection of persons and property from the hazard of fire, explosion or panic.

Sec. 502. Order of vacation. The Director of Public Works or Director of Public Health, within their respective jurisdictions, shall give written notification

of any order to vacate to the Chief of Police who shall thereupon cause the same to be executed and enforced.

• Sec. 503. Right to enter building. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.

Sec. 504. Stopping construction. The Superintendent shall have the power to stop the construction, alterations or repairs or moving of any structure when, in his opinion, such work is being done in a dangerous, reckless or careless manner, or in violation of any of the provisions of this Code, or upon complaint by any City department or agency, and to order all work stopped. The work shall be stopped immediately and shall not be resumed without authorization from the Superintendent.

Sec. 505. Abatement or repair.

(a) Within a rehabilitation area or conservation area.

1. General. All buildings or portions thereof within a rehabilitation area or conservation area which are substandard as set forth in Article 6 of this Code are hereby declared to be public nuisances and shall be caused to be abated or repaired by the Director of Public Works as hereinafter provided.

2. Complaints. The Superintendent shall examine, or cause to be examined, every building or structure,

or portion thereof, coming within the provisions of subsection 1, next above, and if he finds it to be a substandard building, he shall file written complaint with the Director of Public Works which shall contain specific allegations setting forth the conditions complained of.

3. Procedure. Any building or portion thereof within a rehabilitation area or conservation area which is found by the Director of Public Works to be substandard as defined in Article 6 of this Code shall be repaired and rehabilitated, or vacated, demolished and removed in accordance with the procedure set forth in Section 804, subsections (c), (d), (e), (f), (g), (h) and (i) of the Building Code, and as otherwise provided in this Code. (See also Article 17.)

(b) Outside of a rehabilitation area or conservation area, Director of Public Works.

All dwellings or portions thereof outside of a rehabilitation area, or conservation area, which are substandard as set forth in Article 6 of this Code are hereby declared to be public nuisances and the Director of Public Works, upon finding that any building or portion thereof outside a rehabilitation area or conservation area is substandard shall cause it to be repaired and rehabilitated, or vacated, demolished and removed, in accordance with the procedure set forth in Section 804, subsections (b), (c), (d), (e), (f), (g), (h) and (i) of the Building Code.

Outside of a rehabilitation area or conservation area, the owner of a one or two family dwelling built under a lawful permit and subsequently maintained

only for such residential uses, may appeal to the Board of Examiners under the provisions of Section 806(a) of the Building Code on matters relating to the interpretations of the orders by the Director of Public Works as to compliance with the provisions of this Code which establishes the building as substandard. The Board of Examiners may exercise the powers granted to them in paragraphs 2 and 3 of subsection (a) of Section 806 in relation to variances from the provisions of this Code.

(c) Outside of rehabilitation area or conservation area, Director of Public Health.

All apartment houses and hotels, or portions thereof outside of a rehabilitation area or conservation area, which are substandard because of reasons stated in Sections 602, 611 and 615 of this Code are hereby declared to be public nuisances, and the Director of Public Health, upon finding that any building or portion thereof outside a rehabilitation area or conservation area is substandard because of "inadequate sanitation" as defined in Sections 602, 611 and 615 of this Code shall cause it to be repaired and rehabilitated, or vacated, demolished and removed, in accordance with the procedure set forth in Sections 596 to 600 of the Health Code and this Code.

Sec. 506. Posted notices, interference with. It shall be unlawful for any person to interfere with the posting of any notice provided for in this Code, or to tear down or mutilate any such notice so posted in or upon any building or premises by the Department

of Public Works, the Department of Public Health or any other interested department or bureau.

Sec. 507. Penalty for violation. Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue. Any person who shall do any work in violation of any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code, and any person having charge of such work who shall permit it to be done, shall be liable to the penalty provided.

ARTICLE 6

SUBSTANDARD BUILDING

- Sec. 601. Standard building defined.
- Sec. 602. Inadequate sanitation and safety.
- Sec. 603. Structural unsoundness.
- Sec. 604. Nuisance.
- Sec. 605. Hazardous wiring—insufficient outlets.
- Sec. 606. Hazardous plumbing.
- Sec. 607. Hazardous mechanical equipment.
- Sec. 608. Faulty weather protection.
- Sec. 609. Fire nuisance.
- Sec. 610. Faulty materials of construction.
- Sec. 611. Hazardous or insanitary premises.
- Sec. 612. Inadequate maintenance.
- Sec. 613. Inadequate exits.
- Sec. 614. Inadequate fire protection or fire fighting equipment.
- Sec. 615. Improper occupancy.

Sec. 601. Substandard building defined. Any residential building or portion thereof including any dwelling unit, guest room or suite of rooms, or the premises on which the same is located, in which there exists any of the conditions enumerated in this Article to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants thereof shall be deemed and hereby is declared to be a substandard building.

Buildings built under, and in full compliance with, the codes in force at the time of construction or alteration of the building and that have been properly maintained and used for only such use as originally permitted, shall be exempt from the declaration as substandard buildings insofar as paragraph (i) of Section 602 applies.

Sec. 602. Inadequate sanitation and safety, including:

(a) Lack of, or improper water closet, lavatory, bath tub or shower in a dwelling unit.

(b) Lack of, or improper water closets, lavatories, and bath tubs or showers per number of guests in an hotel.

(c) Lack of, or improper kitchen sink in a dwelling unit.

(d) Lack of hot and cold running water to plumbing fixtures in an hotel or lodging house.

(e) Lack of hot and cold running water to plumbing fixtures in a dwelling unit.

(f) Lack of adequate heating facilities or improper operation thereof.

(g) Lack of, or improper operation of required ventilating equipment.

(h) Lack of minimum amounts of natural light and ventilation required by this Code.

(i) Room and space dimensions less than required by this Code.

(j) Lack of required electrical illumination.

- (k) Dampness of habitable rooms.
- (l) Infestation of insects, vermin or rodents.
- (m) General dilapidation or improper maintenance creating an unsafe condition.
- (n) Lack of connection to required sewage disposal system.
- (o) Lack of adequate garbage and rubbish storage and removal facilities.

Sec. 603. Structural unsoundness. All structural elements that do not conform with all applicable laws in effect at the time of installation or the laws in effect at the time of any subsequent extensive alterations or reconstruction, or those which have not been maintained in good and safe condition. It shall include the following:

- (a) Deteriorated or inadequate foundations.
- (b) Defective or deteriorated flooring or floor supports.
- (c) Flooring or floor supports of insufficient size to carry imposed loads with safety.
- (d) Members of walls, partitions, or other vertical supports that split, lean, list or buckle due to defective material or deterioration.
- (e) Members of walls, partitions, or other vertical supports that are of insufficient size to carry imposed loads with safety.
- (f) Members of ceilings, roofs, ceiling and roof supports or other horizontal members which sag, split, or buckle due to defective material or deterioration.

(g) Members of ceilings, roofs, ceiling and roof supports, or other horizontal members that are of insufficient size to carry imposed loads with safety.

(h) Fireplaces or chimneys which list, bulge, or settle, due to defective material or deterioration.

(i) Fireplaces or chimneys which are of insufficient size or strength to carry imposed loads with safety.

Sec. 604. Nuisance. Any nuisance as defined in this Code. (See also Section 203.14.)

Sec. 605. Hazardous wiring—Insufficient outlets.

(a) All wiring except that which conformed with all applicable laws in effect at the time of installation or the laws in effect at the time of any subsequent extensive alterations and which has been maintained in good condition and is being used in a safe manner.

(b) Habitable rooms and kitchens with insufficient number of electrical convenience outlets as required by Section 708 of this Code.

Sec. 606. Hazardous plumbing. All plumbing except that which conformed with all applicable laws in effect at the time of installation or the laws in effect at the time of any subsequent extensive alterations and which has been maintained in good condition and which is free of cross connections and siphonage between fixtures.

Sec. 607. Hazardous mechanical equipment. All mechanical equipment, including vents, except that

which conformed with all applicable laws in effect at the time of installation or the laws in effect at the time of any subsequent extensive alterations and which has been maintained in good and safe condition.

Sec. 608. Faulty weather protection.

- (a) Deteriorated, crumbling or loose plaster.
- (b) Deteriorated or ineffective waterproofing or weather protection of exterior walls, roof, foundations, or floors, including broken windows or doors.
- (c) Broken, rotted, split, or deteriorated exterior wall or roof covering.

Sec. 609. Fire hazard or nuisance. Means anything or any act which increases or may cause an increase of the hazard or menace of fire to a greater degree than that customarily recognized as normal by persons in the public service of preventing, suppressing, or extinguishing fire; or which may obstruct, delay, or hinder, or may become the cause of an obstruction, a delay, or a hindrance to the prevention, suppression, or extinguishment of fire.

Sec. 610. Faulty materials of construction. All materials of construction except those which are specifically allowed or approved by the Building Code, and which have been adequately maintained in good and safe condition.

Sec. 611. Hazardous or insanitary premises. Those premises on which an accumulation of weeds, vegetation, junk, dead organic matter, debris, gar-

bage, offal, rat harborages, stagnant water, combustible materials, and similar materials or conditions, constitute fire, health, or safety hazards.

Sec. 612. Inadequate maintenance. Any building or portion thereof which is determined to be an unsafe building in accordance with Section 804 (a) of the Building Code.

Sec. 613. Inadequate exits. All buildings or portions thereof not provided with adequate exit facilities as required by this Code. When it is determined by the Superintendent and Bureau of Fire Prevention and Public Safety an unsafe condition exists through lack of or improper location of exits, additional exits may be required to be installed as set forth in the Building Code.

Sec. 614. Inadequate fire protection or fire-fighting equipment. All buildings or portions thereof which are not provided with the fire-resistive construction or fire-extinguishing systems or equipment required by this Code.

Sec. 615. Improper occupancy. All buildings or portions thereof occupied for living, sleeping, cooking or eating purposes which were not designed or intended to be used for such occupancies.

ARTICLE 16

MAINTENANCE, SANITATION AND REPAIR

- Sec. 1601. Painting.
 - Sec. 1602. Courts and shafts.
 - Sec. 1603. Wallpaper.
 - Sec. 1604. Garbage receptacles.
 - Sec. 1605. Garbage receptacle compartment.
 - Sec. 1606. Automatic sprinklers.
 - Sec. 1607. Sanitation.
 - Sec. 1608. Deposit of rubbish, etc.
 - Sec. 1609. Bedding.
 - Sec. 1610. Towels.
 - Sec. 1611. Dangerous articles.
 - Sec. 1612. Caretaker.
 - Sec. 1613. Artificial light.
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Sec. 1601. Painting. The walls and ceiling of every sleeping room in an apartment house or hotel, unless there is sufficient natural light to permit a person to read in any part of the room during the day, shall be painted, or papered with a light-colored material. The paint, or paper shall be applied as often as may be necessary to maintain the walls and ceiling in a light color and clean and free from vermin.

Sec. 1602. Courts and shafts. Unless built of light-colored materials, the walls of courts and shafts shall

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be painted in a light color. The paint shall be applied as often as may be necessary to maintain the walls in a light color.

Sec. 1603. Wallpaper. Not more than two thicknesses of wallpaper shall be placed upon any wall, partition, or ceiling of any room in any apartment house or hotel. If any wall, partition, or ceiling with two thicknesses of wall paper in any such room is to be repapered, the old wallpaper shall be first removed. Painting over wallpaper is permissible.

Sec. 1604. Garbage receptacles. Such number of tight metal receptacles with close-fitting metal covers for garbage, refuse, ashes, and rubbish as may be considered necessary by the enforcement agency, or an approved garbage chute or shaft, shall be provided for every building. Each receptacle, chute, or shaft shall be kept in a clean condition by the following persons:

1. In the case of a receptacle in an apartment house or dwelling, by the occupants or tenants of the building.

2. In the case of a receptacle in an hotel, by the owner or person in charge of the hotel.

3. In the case of a chute or shaft in any building, by the person in charge or in control of the building.

Sec. 1605. Garbage receptacle compartment. Every closet or compartment in a building used for storing a garbage receptacle shall be lined on all its sides and on the inside of all its doors with galvanized iron, with all joints made tight.

Sec. 1606. Automatic sprinklers. Standard automatic sprinklers shall be installed in:

1. All garbage and trash chutes.
2. All laundry chutes except for dwellings.
3. All garbage, trash and soiled linen rooms or compartments.

Sec. 1607. Sanitation. Each room, hallway, passageway, stairway, wall, partition, ceiling, floor, skylight, glass window, door, carpet, rug, matting, window curtain, water-closet compartment or room, toilet room, bathroom, slop-sink room, wash room, plumbing fixture, drain, roof, closet, cellar, basement, yard, court, lot, and the premises of every building shall be kept in every part clean, sanitary, and free from all accumulation of debris, filth, rubbish, garbage, vermin, and other offensive matter.

Sec. 1608. Deposit of rubbish, etc. No person shall do, or permit or cause another person to do, any of the following:

1. Deposit any swill, garbage, bottles, ashes, cans, or other improper substances in, or in any way obstruct, any water-closet, sink, slop hopper, bathtub, shower, catch-basin, or plumbing fixture connection or drain.

2. Put any filth, urine, or foul matter in any place other than the place provided for it.

3. Keep any filth, urine, or other foul matter in any room, or elsewhere in or about the premises, of

any building for such length of time as will result in the creation of a nuisance.

Sec. 1609. Bedding. In every apartment house or hotel every part of every bed, including the mattress, sheets, blankets, and bedding, shall be kept in a clean, dry and sanitary condition, free from filth, urine, or other foul matter, and from the infestation of lice, bedbugs, or other insects. The bed linen of a bed in an hotel shall be changed as often as a new guest occupies the bed.

Sec. 1610. Towels. No roller or public towel shall be kept or maintained in an hotel for common use.

Sec. 1611. Dangerous articles. Neither any article that is dangerous nor detrimental to life or to the health of the occupants; nor any feed, hay, straw, excelsior, cotton, paper stock, rags, junk, or any material that may create a fire hazard, shall be kept, stored or handled in any part of an apartment house or hotel, or the lot on which such building is situated, except upon a written permit obtained from the officer or agency authorized by law to issue the permit. Every permit shall be made in duplicate, and a copy shall remain on file in the office of the officer or agency issuing it. Every filed copy constitutes a public record.

Sec. 1612. Caretaker. A janitor, housekeeper, or other responsible person shall reside upon the premises and shall have charge of every apartment house in

which there are sixteen or more apartments, and of every hotel in which there are twelve or more guest rooms, in the event that the owner of any such apartment house or hotel does not reside upon said premises. If the owner does not reside upon the premises of any apartment house in which there are more than four but less than sixteen apartments, a notice stating his name and address, or the name and address of his agent in charge of the apartment house, shall be posted in a conspicuous place on the premises.

Sec. 1613. Artificial light. In every apartment house and in every hotel there shall be installed and kept burning throughout the year artificial light sufficient in volume to illuminate properly every public hallway, passageway, public stairway, fire-escape egress, elevator, public water closet compartment, or toilet room, in any part of which there is insufficient natural light to permit a person to read.

ARTICLE 17
HOUSING APPEALS BOARD

Sec. 1701. Establishment.

Sec. 1702. Membership.

Sec. 1703. Powers of the Board.

Sec. 1704. Procedure.

Sec. 1705. Quorum.

Sec. 1706. Appeals.

Sec. 1707. Hearings.

Sec. 1708. Compensation.

Sec. 1701. Establishment. There is hereby established a Housing Appeals Board consisting of five members who are residents of the City and County of San Francisco and who are qualified by training and experience to pass upon matters pertaining to housing and the health, safety and welfare of the public. None of the members, except the ex-officio members, shall be a public employee.

Sec. 1702. Membership. The members of the Board shall be appointed by the Chief Administrative Officer, and each member shall hold office for four years or until his successor is qualified and appointed, provided however, that those first appointed shall so classify themselves by lot that their several terms shall expire two at the end of one year and one each at the end of two, three and four years respectively, from the date of appointment of the original Board.

The following shall constitute ex-officio members of the Board without vote: Director of Planning, the Coordinator or the Associate Coordinator of Urban Renewal.

The Urban Renewal Analyst of the Bureau of Building Inspection shall act as Secretary to the Board.

Sec. 1703. Powers of the Board. The Board shall have the power to hear and decide appeals from orders of condemnation or abatement after public hearing, by the Director of Public Works or the Director of Public Health, as the case may be, made pursuant to Section 505 of this Code.

The Board may affirm, modify or reverse such orders provided that the public health, safety and welfare is secured and substantial justice done most nearly in accordance with the intent and purpose of this Code.

Sec. 1704. Procedure. The Board shall establish reasonable rules and regulations for its own procedures consistent with the provisions of this Code and the City Charter. The Board, by majority vote, shall choose its officers other than the Secretary.

Sec. 1705. Quorum. Four members of the Board shall constitute a quorum. Any action of the Board shall require the concurrence of not less than three members. No member of the Board shall pass upon any case of which he or any corporation of which he is a shareholder, is interested.

Sec. 1706. Appeals. Any person may appeal from orders of condemnation or abatement after public hearing by the Director of Public Works or Director of Public Health, as the case may be, made pursuant to Section 505 of this Code and shall, at the hearings provided for in Section 505 of this Code, be apprised of his right of appeal to the Housing Appeals Board provided the appeal is made in writing and filed with the Secretary within ten days after such orders of the Director of Public Works or Director of Public Health as the case may be.

Sec. 1707. Hearings. Hearings of the Board shall be held at the call of the Secretary of the Board and at such times as the Board may determine. All hearings of the Board shall be public hearings. The Board shall fix the time and place of hearing, not less than five days or more than ten days after the filing of the appeal and shall act on such appeal not later than thirty days after the date on which appeal was filed with the Board. The Board shall submit its findings and decision to the appellant and the Director of Public Works or the Director of Public Health. If the Board has not acted within the time prescribed in this section, the orders of the Director of Public Works or the Director of Public Health, as the case may be, become immediately effective.

The Board shall hear the appellant, a representative of the department from whose action the appeal is taken and other interested parties.

Sec. 1708. Compensation. The members of this Board shall receive no compensation but shall be allowed necessary actual travel and other expenses when the interest of the City shall require it but in each case, only if and when the Board of Supervisors shall have first specifically authorized the purpose and expenditures involved.



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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1965

No. 1139

ROLAND CAMARA,

Appellant,

VS.

MUNICIPAL COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO,

Appellee,

STATE OF CALIFORNIA,

Real Party in Interest.

On Appeal from the Judgment of the District Court of Appeal,
State of California, First Appellate District

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

1. THIS APPEAL IS RIPE FOR REVIEW.

As conceded in the Motion to Dismiss (p. 6) the judgment below is a final judgment and this appeal is within the jurisdiction of this Court. See *Rescue Army v. Municipal Court*, 331 U.S. 549, 566-68 (1946), and the cases cited therein, in which the Court recognizes that jurisdiction lies to review the denial by the

highest State court of a writ of prohibition to prevent criminal prosecution.

Given this jurisdiction, the appeal is ripe for review. There is nothing further in this case than a decision on the federal constitutional issues. As the opinion of the District Court of Appeal states (J. S. App. A ii):

"Plaintiff expressly concedes that he committed the offense proscribed by section 507 of the Housing Code and that his defense to prosecution for said charge is predicated solely upon the alleged unconstitutionality of section 503 of said code."

The Motion to Dismiss unrealistically conjures up certain "possible" remaining issues. However, this appeal is a clear-cut attack on the face of the ordinance for its failure to require probable cause or a warrant. The "question" raised by the Motion to Dismiss (p. 8) about appellant's residency is specious. A comparison of paragraphs I and II of the Petition for the writ in the trial court (R.T. 3-4) with paragraphs I and II of the Answer (R.T. 24-26) shows that no issue of fact on residency exists in this case. Furthermore, the fact of residency, which will lead to a criminal conviction, is hardly a "*self-serving* 'admission'".

Judicial policy is not served by requiring the accused to submit to the onus of a criminal conviction in order once again to raise certain well-defined constitutional issues when he now presents these issues through a procedure that has been accepted by this Court as jurisdictionally proper.

2. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The very length that the State goes to in order to show the supposed insignificance of this case emphasizes how substantial the issues are.

a. The Motion to Dismiss (p. 9) concedes that the precise questions presented by this appeal are not controlled by *Frank v. Maryland*, 359 U.S. 360 (1959). In the *Frank* case the ordinance at least required probable cause although no warrant was required. As was pointed out in the Jurisdictional Statement (pp. 12-13) the instant case authorizes a search of private homes without warrant or probable cause—something the majority of the Court in the *Frank* case would not have allowed.

b. Despite the State's contention, the opinion in *Frank* clearly states that the protections of the Fourth Amendment, as applicable to the States through the Fourteenth Amendment, are limited to criminal proceedings (359 U.S. at 365-66). Such a restriction of the Fourth Amendment is contrary to the decisions of this Court. See *Marcus v. Property Search Warrant*, 367 U.S. 717 (1961); *Mapp v. Ohio*, 367 U.S. 643 (1961); and *Stanford v. Texas*, 379 U.S. 476 (1965), all of which are discussed in the Jurisdictional Statement at pages 8-10.

c. To require minimal constitutional safeguards is not to prohibit orderly and effective procedures in maintaining proper health standards. The protection against the unreasonable search of one's home is a fundamental constitutional protection. By placing the neutral judge between the administrator and the in-

dividual, the use of the warrant prevents the overzealous or vindictive administrator from the arbitrary exercise of the vast authority given him.

It would be far too facile a means of evading judicial control by characterizing an inspection as part of a "planned area inspection" as the State is wont to do. Given the need for continuous inspection of large areas to assure conformity to health standards, we must also recognize the greater constitutional necessity of preventing uncontrolled intrusion into private dwellings. Surely reasonable procedural protections can be devised to meet both these needs.

CONCLUSION

For these reasons it is respectfully submitted that the Motion to Dismiss be denied and that the Court either reverse the decision below upon the merits or else note probable jurisdiction of this appeal.

Dated, San Francisco, California,

June 27, 1966.

Respectfully submitted,

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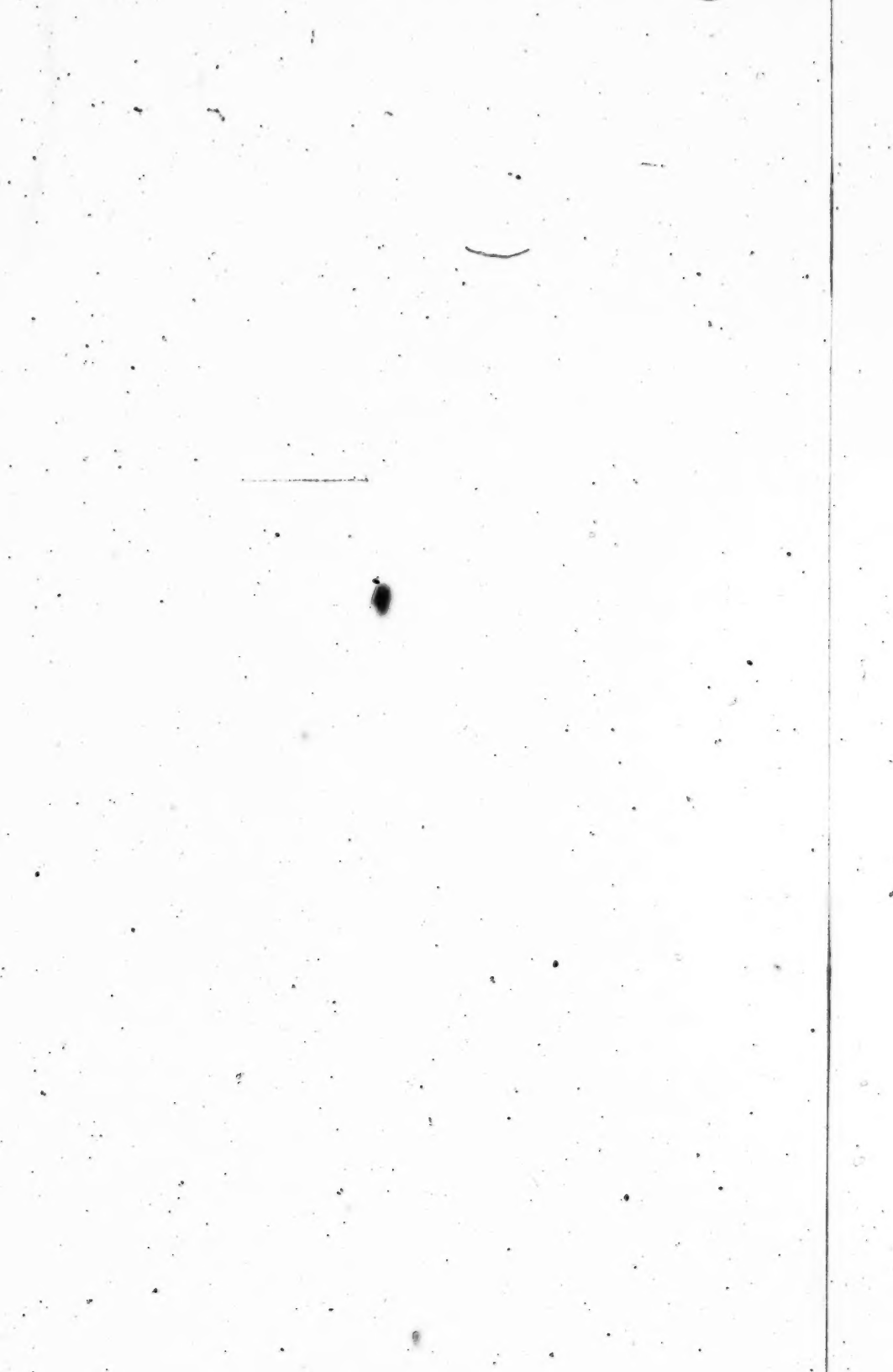
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IN THE
Supreme Court of the United States

October Term 1966

No. 92

ROLAND CAMARA,

Appellant,

v.

THE MUNICIPAL COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO,

Appellee.

BRIEF OF HOMEOWNERS IN OPPOSITION TO
HOUSING AUTHORITARIANISM, *Amicus Curiae*

Interest of the AMICUS, and its Objectives as an
Organization

*As in all Utopias, the right to have
plans of any significance belonged
only to the planners in charge.*

—JANE JACOBS

Frank of *Frank v. Maryland*,¹ was in a position to be but little affected, ultimately, by the decision in his case.² But this *amicus* was gravely affected. Slum land-

¹ 359 U.S. 360, 79 S. Ct. 807

² "[An external inspection revealed the Frank house to be] in an 'extreme state of decay,' and . . . in the rear of the house there was a pile later identified as 'rodent feces mixed with straw and trash and debris to approximately half a ton.'" 79 S. Ct. at 806. Had a warrant been required for entry and search, it is submitted that it would clearly have been obtainable.

lords were also affected—they were assisted, in a way which will be argued below; as were building enforcement officials, to a minor degree. Also affected was the very subjective, and statistically difficult to analyze, but economically and socially important matter of the psychological impact of *Frank* on the future of cities as cities. Atmosphere, or “ambiance,” as it is presently popularly denominated. However called, the phenomenon has been spoken of since time-out-of-mind by poets, chroniclers, and sociologists—from the poets and chroniclers of the Bible and before, through the modern poet-chronicler-sociologist Jane Jacobs.³ It is an “ambiance” much affected by the *Frank* case.

“Homeowners in Opposition to Housing Authoritarianism” (HOOHA) is a citizen’s organization formed and active in Baltimore, home of the *Frank* case, since 1962. The membership of the organization is not large—not over sixty, not under fifty—but its influence, it believes, and its following, is large, so that it has been cited with some frequency in discussions of matters related to “inner city” homeowners’ problems.⁴

The group is composed entirely of homeowning residents of Baltimore City, mostly in what has come to be called “the inner city.” Though membership is not exclusive on any basis, the special appeal of HOOHA is not to the slum dweller, who has separate problems which are well recognized by government and society, and which are within the compass of myriad bodies,

³ *The Death and Life of Great American Cities*. New York, Random House (1961).

⁴ Among others, *The Wall Street Journal*, March 24, 1964; *Architectural Forum*, May, 1964 pgs. 9-10; 78 H. L. Rev. 801, at 858, ftnt. 293; and in the local Baltimore press, which has not only devoted news-article attention to HOOHA, but has made it, and its positions, the subject of several editorials.

both governmental and private. Rather, its appeal has been to those persons who have selected for themselves and their families, as a matter of voluntary choice and preference, city life, with its disparate rewards, meanings, beauty, values, virtues, textures and conditions, in preference to a life in, and dedication to, the falser standards, and fainter conditions, the monotony and the bathos, of life in suburbia. Composed largely of family people with children, of professionals or spouses of professionals, and having members in such fields, among others, as journalism, science, art, the concert stage, medicine, law, and writing, the organization is yet not a society of detached *literatti*.

Rather, as its battle cry and slogan indicates (BURHA^{*} go home!), its bent is more in the direction of activism than not, and one of its purposes has always been the importuning, education and enlightenment of City Councilmen, state, BURHA, and occasionally federal bureau of roads, people, upon subjects concerning home ownership and city living. Particularly as concerns city living in strong, economically viable, city neighborhoods. Let it be said that "self-protecting" means from unwanted encroachment on private desires and standards by government officials. It does not mean, and has, no racial implication whatever. HOOHA's members are in the main from integrated communities, and accept as a way of life and a natural concomitant of city living, racial integration, and frequent mixed social contacts. *None* of this organization's problems or goals have to do with color or segregation.

Specifically, HOOHA was formed to do battle in every arena—political, judicial, and educational, among others—against compulsory door-to-door inspection and

* Baltimore Urban Renewal and Housing Agency.

forced "upgrading" of private, owner-occupied homes or apartments, as to matters not overtly affecting the public weal.

HOOHA believes in the contrary—that the private homeowner has the right to the undisturbed enjoyment of his own premises, to the management of his own budget, and to the free expression of his own esthetic choices; rights which frequently run at cross-purposes to city inspection goals and standards, while not touching at all upon questions of health, welfare and safety.

It is HOOHA's purpose, then, to support and defend not only its own members, but every homeowner, including those who are small, or in straitened economic circumstances, or who are inarticulate, or are otherwise not equipped to deal with the callousness and coldness of powerful governmental representatives when these representatives are so often themselves well-equipped with gall, or ill-equipped with sympathy, esthetic sensibility, or even intelligence and conscience.⁶

⁶ "Budgetary limitations also preclude payment of salaries that will attract highly qualified [inspection] personnel . . . One neglected aspect of inspector training is . . . public relations techniques." *Enforcement of Housing Codes*, 78 Harv. L. Rev. 805.

"In Baltimore, Md., strong homeowner opposition to code enforcement and urban renewal began when inspectors indelicately threatened to compel homeowners to make what the owners considered minor repairs and aesthetic changes. Interview with Member Homeowners in Opposition to Housing Authoritarianism (HOOHA), Baltimore, Md., August 26, 1964." *Enforcement of Housing Codes*. 78 H.L. Rev. 858 n. 293.

The data gathered in this article by a group of 3rd and 4th year Harvard law students is interesting, though the article frequently outrages the reader's sense of humor as far as interpretation by the young men of their data is concerned. E.g. (at 811): "[T]he only feasible way to obtain compliance [with Housing Codes] when the culprit cannot be discovered is to charge the landlord with responsibility." (Emph. supp.)

The organization believes that with the tremendously increased social and economic pressures which have of late come to bear upon American cities, and upon life in modern civilization in general, the private home is the last sanctuary of rest and repose. And so it is the hope of this group that it may prevail upon the Court to return to its members, and to every inner-city resident trying to make a home under difficult conditions, some degree at least, of the safety and sanctity which their residences had, in the eyes of the law, before *Frank*.

SUMMARY OF ARGUMENT

Frank v. Maryland cannot be reconciled, on historical terms, with the antecedent roots of the Fourth Amendment. Insofar as *Frank* was based on history, it was in error.

Legal precedent, particularly *Boyd v. U.S.*¹ which was relied on in *Frank* fails to uphold the Court's view as expressed in *Frank*, especially when applied to private, owner-occupied residences. In this respect, at least, it is argued, *Frank* should be overruled.

There is no distinction in history, precedent, or logic upon which entry for general public welfare purposes into private premises can be distinguished from entry to search for evidence of criminal activity, nor should there be.

The vitality and progress of urban societies and cities depends not on broadening the right of governmental agents to enter private premises, but on narrowing it; narrowness is dictated by the spirit of the Fourth Amendment as well as its obvious letter.

¹ 116 U.S. 616. 29 S. Ct. 749 (1886)

ARGUMENT

History

History was applied to the *Frank* decision by the Court.

The history cited was misread, it is respectfully urged, if (1.) writs of assistance and general warrants are as objectionable as searches without warrants—which assumption certainly cannot be disputed—and, (2.) if customs, revenue, and excise searches cannot be distinguished—or could not have been distinguished in the colonial context—from health and general welfare searches in the context of the modern city.

If however, the distinction fails between the old revenue, and modern health searches, then history is on the side of the Appellant herein, and *Frank* was, insofar as the distinction does fail, in error.

But the question of whether there can be such a distinction, itself is entangled with the question of *what the history—of the Fourth Amendment—is.*

Therefore the Court is respectfully referred to Appendix A hereof, in which are reprinted extensive excerpts from "*The History and Development of the Fourth Amendment to the United States Constitution*, by Nelson B. Lasson, Series LV Number 2, The Johns Hopkins University Studies in Historical and Political Science, (1937). Lasson's work is a brilliantly composed compendium, interpretation and analysis, based principally upon the primary sources, of the historical roots, to the tenth century and beyond, of the sturdy tree of the Fourth Amendment.

Not only are the principle buttresses of the Opinion in *Frank* discussed by Lasson—*Entick v. Carrington*, *The North Briton* Number 45 incident, and *Wilkes*, and *Pitt*—but the later, contextually more prominent series of searches, seizures, riots and rescues in the colonies, which

directly anteceded the adoption of the Fourth Amendment are collected and disclosed in *Lasson*.

It is respectfully suggested that this history grants more—far more—than *Frank* would admit.

Thus, the antecedents of the Fourth Amendment are found in the outrage and reaction engendered over centuries, first by injustices rendered in the name of general warrants, then by writs of assistance. In all of the important instances, the purposes of the writs and the warrants related to civil confiscations of goods, or to search for evidence of crimes; sometimes the one and sometimes the other.

In *Lasson's* work (Appendix A), he leads one, in a careful, scholarly manner, it is suggested, to conclude that contrary to the characterization of events set forth in *Frank*, it was historically *never* conceived that a man's house was his castle as to crimes, but not as to civil trespass or other unmasked investigations; nor was a distinction *ever* understood to exist between some violations of the sanctity of a home's four walls, and other such violations; nor that the rights of private residence could be violated in the name of the general welfare, but not in the name of a search for criminal evidence. Such a conception—that there is a distinction between searches in investigation of crimes, and for other purposes, at least upon examination of history—appears but to have sprung full blown from the brow of this Court in 1959.

The distinction seems to have been based, in *Frank*, on the idea of a "bolstering" of the Fourth Amendment by the Fifth. But the Fourth was historically recognized as being based on an inherent, fundamental, right, and it has, it is respectfully submitted, a vitality of its own, all unaided by the Fifth, as is expounded by the *facts of history* discussed in *Lasson*.

... Early Maryland Statutes Cited in FRANK

In *Frank* the Court cited also a number of early Maryland statutes (359 U.S. at 809-10) giving the right of search without warrant in tobacco, food and revenue cases. The Court overlooked, or did not explain the fact that these cited statutes *all preceded* the adoption of the Fourth Amendment (1789). Many of these statutes, also, *preceded* most of the furor and outrage engendered by the writs of assistance.⁸ Moreover, Maryland has the deplorable distinction, among the colonies, of having had the earliest of the writs of assistance⁹—a fitting prologue to its being the situs of the *Frank* case—so that it can just as well be said that the import of the history of the early statutes is to show as a motivation *a striking down*, or an expression of a change of policy in Maryland's ratification of the Fourth Amendment.

... The Reliance, in FRANK on the Boyd Case and Old Statutes

Nor does the Opinion in *Boyd v. U.S.*, 116 U.S. 616, 29 S. Ct. 749 (1886) much substantiate, it is respectfully suggested, the reading given it in *Frank*.

⁸ E.g. LXXXIII (Laws November 1773 c.1); Laws 1717 c.VII; Laws 1715 c. XLVI; May 1756 p. 5 Sec. LVI; March 1758 p. 3 Sec. X., *Frank*, 359 U.S. at 809-10.

⁹ N. 20, p. 55, Lasson: An examination of the Maryland Archives reveals a colonial writ of assistance of an earlier date than any the writer has seen mentioned before. This writ was issued by the Council of Maryland to Patrick Mein, Surveyor General of the Customs in Virginia and Maryland, on November 10, 1686, in response to his request for a writ of assistance "as is usual in such cases." The writ, however, did not recite any general powers of search and its sole purpose was to command assistance, but the fact is evident that the recitation in Mein's commission of general search powers was taken by everyone concerned to be of itself sufficient authority in this regard. Indeed, the commission itself reads like a general writ of assistance. Archives of Maryland (Baltimore, 1887), V, 521-524.

The statute in question there was termed,

"(T)he first Act in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the Act under which the obnoxious writs of assistance were issued did not go as far as this, but only authorized the examination of ships and vessels and persons found therein, for the purpose of finding goods prohibited . . . , and to enter into and search any suspected vaults, cellars, or warehouses for such goods. . . .

" . . . (B)y the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property." 29 S. Ct. at 748.

Likewise, in the present case (even, it is realized, as in *Frank*), the Appellant was coerced to allow officials to enter his private residence, by liability to a penalty for non-compliance.

The Court also said, in *Boyd*,

"The principles laid down in ['Lord Camden's memorable discussion . . . (in) *Entick v. Carrington*'] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to *all* invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his *indefeasible right of personal security, personal liberty and private property* . . . it is the invasion

of this sacred right which underlies and constitutes the essence of Lord Camden's judgment." (Emph. supp.)

Then, in the next sentence, the Court states,

[C]ompulsory extortion . . . of private papers to be used as evidence is condemn[ed] . . . In this regard the Fourth and Fifth Amendments *run almost into each other.*" (Emph. supp.)

Furthermore, the Court in *Boyd*, at 752, in stating that " 'The unreasonable searches and seizures' condemned in the Fourth Amendment are *almost always* made for the purpose of compelling a man to give evidence against himself," clearly indicates, one would think, that there are *other* kinds of searches which are unreasonable as well.

But the Court in *Boyd*, *did not* say that Lord Camden's principles laid down in *Entick*, *only* apply where self-incrimination is involved. The Court *did not* say, nor imply, that the Fourth Amendment is operable *only* when the Fifth is violated. It *did not* say that the *only* unreasonable search is one in which self-incrimination is involved.

In *Frank* this Court held otherwise-substantially misinterpreting *Boyd*. This *amicus* hopes, and urges, that *Frank* be overruled.

Frank was based entirely on the proposition, it is submitted, that any search is *reasonable* where "No evidence for criminal prosecution is sought to be seized" (at 359 U.S. 366). *Boyd* did not so hold. Lord Camden did not so hold. Gray, in the famous Appendix to Quincy did not so hold. Patrick Henry, Madison, Adams and Otis did not so hold.

In fact the *purpose* of the official intrusion has, it is submitted, *no* bearing on the Fourth Amendment. An unreasonable search is one conducted in private residential premises, without a warrant, for any reason other than the exceptional or emergency circumstances such as are spoken of in the dissent in *Frank* at p. 380 of 359 U.S. A search of a vessel, of a man seized in hue and cry, or inspection of "ships and carriages" (*Frank* p. 367), *might* be a reasonable search without a warrant. But not of private premises after the adoption of the Fourth Amendment.

The Court's reference at p. 369, to Maryland statutes of 1782 and 1787 empowering Commissioners to enter on private "lots, grounds and possessions" . . . to repair common sewerage systems and to keep roads in repair are in the nature of eminent domain statutes, and if, *arguendo*, they are constitutional, they yet do not solve the present question of *searches* of private premises to discover building code violations. They are statutes which *even if* constitutional, and that is doubted, should be decided according to the rationale of *eminent domain*, and *not* of search and seizure.

Nor was the Court correct in *Frank* at p. 369 in citing a 1789 statute permitting seizure of bread deficient in weight or fineness, as an example of a statute permitting entry into any private home. Though the Court's clear implication seems to be that the statute permitted this, that statute, on the contrary seems to permit entry only in the case of persons making or offering bread *for sale*. To imply that it applied to every householder who did not make bread for sale to the public, and not just to bakers, is to seriously strain the import of that early Act. It is reprinted in Appendix B.

Besides this Bread Act antedates the adoption of the Fourth Amendment by some months.^{9A}

Other Considerations; Resident Owners Do Not Cause Slums

This *amicus*, along with Professor Martin Anderson¹⁰ and others, are disappointed that from many viewpoints, and frequently in the most important respects, federal urban renewal programs have been usually, dismal failures.

Others, mostly non-resident monetary beneficiaries of urban renewal programs, it must be said, or those living far away from the projects in sheltered suburbs, contend just as strongly that the programs have been fully successful.

This dispute cannot, of course, be settled within the judicial confines of this case, and of course, the dispute is fully irrelevant to the case, except that, hovering over all is the constant contention of inspecting officials that all of their programs—of zoning control, of health, fire and building code enforcement, of urban “renewal” and slum “eradication”—will collapse entirely without the right to inspect private residential premises without a warrant.

Aside from the inapplicability of this plea as a validating constitutional argument, this *amicus* (and the cumulated in-city residence experience of its members is quite large), respectfully contends that as an argument, it simply is *not factually true*. The resident owner is

^{9A} Lasson, *op. cit.* p. 104, states “[Rhode Island] adopted the Constitution by a vote of 34 to 32 in May, 1790. The legislature later ratified the proposed amendments. Rhode Island being the ninth state to ratify, the amendments thereupon became a part of the Constitution.” See also p. “App. 22,” of Appendix A.

¹⁰ *The Federal Bulldozer*, Martin Anderson. Massachusetts Institute of Technology (1964).

not a causative factor in the creation of slums, or their maintenance, and probably never has been.

Baltimore is a city of homeowners. Among the large cities of the country, Baltimore is in the upper reaches in the ratio of owner-occupied dwellings to non-owner occupied.¹¹ Under the cover of a benevolent "ground rent" system it has almost always been so, in the city's long history.

Baltimore's owner occupancy has been long reflected in vast blocks of neat row houses within the city, with matching rows of scrubbed marble steps quarried from the nearby Beaver Quarries, with well-kept yards, clean streets and clean alleys.¹²

With the well known and well documented national population flow of the past two and a half decades, of course, much of this has changed. With an inflow of population from rural areas, and an outflow from city to suburb, slums have grown and spread in the older sections of town, in Baltimore, as elsewhere. But not entirely. In Baltimore a number of huge, neat, white-marble-step, middle class, owner-occupied neighborhoods have held, intact. Other neighborhoods—Bolton Hill, Tyson Street (like Washington's Georgetown), have not only improved themselves, but have stepped up the

¹¹ 1960 census figures show the following percentage of owner-occupied dwelling units in the nation's eleven largest cities, and some others chosen at random: Manhattan 21.8%; Chicago 34.3%; Los Angeles 46.2%; Philadelphia 61.9%; Detroit 58.2%; *Baltimore* 54.3%; Houston 60.4%; Cleveland 44.9%; Washington, D.C. 30.0%; St. Louis 38.2%; Milwaukee 48.4%. (Foregoing are eleven largest cities, in order, with Manhattan chosen as representative of New York.) Also, Boston 27.3%; San Francisco 35.0%; Fort Worth 65.5%. All figures are from U. S. Census of Housing (1960), City Blocks. Bureau of the Census Series HC (3). Table 1, p. 1 for each city.

¹² See *Sunday Sun Magazine*. Article by John C. Schmidt, Feb. 17, 1963.

scale—even as Georgetown—to something other than middle class.

None, or very little of this neighborhood holding, or improvement, has been due to governmental programs of area code enforcement, slum clearance, urban renewal or rehabilitation. These programs basically are not, nor have they ever been, designed for maintaining neighborhoods where the strong impetus of *home ownership* already exists.

It is when the homeowner flees, that the slum spreads.

But the government agents under governmental programming and bureaucratizing come anyway, into owner-occupied homes, prying, peering, carping.

Frequently these inspectors do not themselves live in city areas, and do not understand the reason why anyone else would live in a beleaguered in-town area, especially areas being pressed by slums. Suburbia they understand. Little League and Beltway they know. Formstone,¹³ they appreciate. But the "townhouse" they do not know, thirteen-foot ceilings, graceful staircases, walled gardens, pine flooring, velvety patina-ed old brick facades, carved stone cornices, they do not know.¹⁴

The reaction of the inspector to the home-owning city dweller is likely to be akin to that described by Emerson:

They are lonely; the spirit of their writing and conversation is lonely; they repel influences; they shun general society; they incline to shut themselves in their chamber in the house . . . and to find their tasks and amusements in solitude. Society, to be sure, does not take this very well; it saith, Whoso goes to walk alone, accuses the whole world; he

¹³ T.M. Reg.

¹⁴ See fnnt. 6.

declares all to be unfit to be his companions; it is very uncivil, nay, insulting; Society will retaliate.¹⁵

Here the Two Cultures clash.

An example of the seriousness of the clash may be found in this nearly direct quotation from an editorial in the *Baltimore Sun*:

A proposed new Housing Code for Baltimore City, at this writing still pending before the City Council will provide that "every dwelling" in the city be kept in "good repair." Some items are listed in the Code to indicate what is considered "good repair," such as all windows clean and no loose wallpaper or flaking paint, but the Code says that "good repair" is not limited to the enumerated standards. The actual working definition of what this may mean is left up to a *committee* composed of the chief inspector, the fire chief, the urban renewal director and the health commissioner, who are given very broad rule making power—"such rules as they may deem necessary and proper"—Thus to reduce the law to its essence: every homeowner in Baltimore would be required to keep his property in whatever condition is considered fitting and proper at any given time by four city officials, and anyone guilty of violating the rules or regulations would be liable to a fine of up to \$300 for each day.¹⁶

This is no way to revitalize a city, to invite cultured, or educated, or concerned, mature people to come live in it, nor is it a way to convince them not to leave. To turn loose upon them masses of petty officials, to disrupt their lives, pursuits and pleasures, with rules, with findings, with inspections, and tyrannies, is madness—economic, sociological, psychological and jurisprudential.

¹⁵ Emerson, *The Transcendentalist*, in *Selections from Ralph Waldo Emerson* 198-99 (Whicher ed. 1960).

¹⁶ The Sun, Baltimore, May 23, 1966, Editorial, "Good Repair."

Furthermore, inspection of owner-occupied dwellings distracts attention from the more difficult problem—for the inspector—of running to earth the offenses of the absentee landlord, and of the teeming slum in the next block. Inspectors pressed for statistical results will concentrate on the resident owner, who is a softer target, less knowledgeable, ordinarily, in the ways of the bureaucratic world, and is present, not absent.

**This AMICUS is Much Discomfited by a Portion
of the FRANK Dissent.**

This *amicus*, moreover, draws no comfort whatever from Mr. Justice Douglas' dissent in *Frank*, and the ominous speculation that what is probable cause in a civil matter may be something less than that required in a search for criminal evidence—that it may be merely a lack of inspection for some finite period of time. If this view was observed in Lord Camden's discourse in *Entick v. Carrington*, or in *Boyd*, or in the Fourth Amendment, or in Section 39 of Magna Carta, it is respectfully suggested that it is a view which has never been found there before.

The time for an inspection is not, constitutionally, when there has been no inspection for a period, but only when external manifestations exist which give probable cause to believe that there is an internally contained threat to the public health safety or welfare in the home in question. Otherwise "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men," in the words of Brandeis (in dissent) in *Olmstead*,¹⁷ should prevail.

¹⁷ *Olmstead v. U.S.* 277 U.S. 438, 478

This *amicus* most desperately entreats a reexamination of this *Frank* dictum, as well as of the majority holding, for it's cry is that of the dictum-affected. It is they whose hearts were wrung by *Frank*. *Frank* ultimately didn't care. His house stood, in glorious abandoned disrepair on Reisterstown Road in Baltimore City for at least three years before being demolished to make way for an equally unlovely used car lot.

Conclusion

This *amicus* urges the Court to find for the Appellant, reversing *Frank v. Maryland*.

Respectfully submitted,

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Attorney for Homeowners
in Opposition to Housing
Authoritarianism,

**Amicus Curiae*

**APPENDIX A
EXCERPTS FROM
"THE HISTORY AND DEVELOPMENT
OF THE FOURTH AMENDMENT
TO THE UNITED STATES
CONSTITUTION"**

**By
NELSON B. LASSON
SERIES LV, NUMBER 2,
STUDIES IN HISTORICAL
AND POLITICAL SCIENCE OF
THE JOHNS HOPKINS PRESS
(1937)**

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APPENDIX A
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CHAPTER I
Early Background

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"In the reign of Henry VI (1422-1461), the king granted the Company of Dyers in London the privilege of searching for and seizing cloth dyed with logwood. This was probably the origin of the practice which was subsequently adopted by Parliament and the Court of Star Chamber, of giving general searching powers to certain organized trades in the enforcement of their sundry regulations. Thus, in 1495, Parliament gave the Mayor of London and the wardens of shearmen in London authority 'to enter and search the workmanship of all manner of persons occupying the broad shear, as well as fustians of cloth.' A few years later, in the time of Henry VIII, a statute gave the governing authorities of every city, borough, or town, and the masters and wardens of tallow-chandlers, 'full power and authority to search for all manner of oils brought in to be sold, in whose hands they be, and as often as the case shall require,' *with the right to condemn and destroy* all altered oils and to commit and punish the persons violating the act." pp. 22-23 (Emph. supp).

App. 2

The Court is respectfully requested to note that this early example of the use of a general warrant was for the exercise of a *civil* remedy, and *not a criminal prosecution*. That is, the purpose was the condemnation and destruction of goods, and not the criminal prosecution of persons.

The historical connection with the eventual adoption of the Fourth Amendment is in a direct line from this statute, as will be shown below, a statute in which, just as in the San Francisco inspection statute, the primary concern is the "general welfare" and health, and not criminal prosecution. (Albeit the welfare is that of the sovereign, and not of the general population.)

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"The Star Chamber, in conformity with the practice mentioned above, decreed that the wardens of the Stationers' Company or any two members deputed by them should have authority to open all packs and trunks of papers and books brought into the country, to search in any warehouse, shop, or any other place where they suspected a violation of the laws of printing to be taking place, to seize the books printed contrary to law and bring the offenders before the Court of High Commission. This was followed in 1586 by another Star Chamber decree which recited that the various laws and ordinances to regulate printing had been totally unheeded and ineffective and provided for stricter censorship, more rigorous penalties, and similar unlimited powers of search and seizure. It would seem that resistance to such search under the older ordinance had not been unusual. This is indicated by the fact that *it was now found necessary to insert an additional provision severely punishing any opposition to this authority.*" pp.24-25 (Emph. Supp.)

App. 3

—Just as in *Frank*, and in *Camara* below, there was provision for severe punishment by fining, for resistance to the inspector's authority.

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"No limitations seem to have been observed in giving messengers powers of search and arrest in ferreting out offenders and evidence. Persons and places were not necessarily specified, seizure of papers and effects was indiscriminate, everything was left to the discretion of the bearer of the warrant. Oath and probable cause, of course, had no place in such warrants, which were so general that they could be issued upon the merest rumor with no evidence to support them and indeed for the very purpose of possibly securing some evidence in order to support a charge. To cite one example, a Privy Council warrant was issued in 1596 for the apprehension of a certain printer, upon information 'which maye touché' his allegiance, with authority to search for and seize 'all books, papers, writings, and other things whatsoever that you shall find in his house to be kept unlawfully and offensively, that the same maye serve to discover the offense wherewith he is charged.' " pp. 26-27.

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"In 1629 the Privy Council gave orders, moreover, empowering its messengers to enter into any vessel, house, warehouse, or cellar, search in any trunk or chest and break any bulk whatsoever, and arrest anyone making any speech against his Majesty's service or causing any disturbance. An historian of the period writes that these officers under pretense of searching 'used many oppressions and rogueries, which caused the people still more to exclaim.' The final and natural result of all these arbitrary measures, characteristic of all attempts at law enforcement in the teeth of public feeling, was that the king had little revenue and the people were more dissatisfied than ever.

"General search for documentary evidence was also a prevalent practice during Charles' rule. . .

"The most outstanding of these instances was the case of Sir Edward Coke, the . . . most influential of the Crown's opponents. On the theory that certain works in preparation contained matter prejudicial to the prerogative, that seditious papers were in circulation among the popular party, and that this was an opportune time to discover them and to strike a telling blow, the Privy Council in 1634, when Coke was on his deathbed, sent a messenger to his home with an order to search for 'seditious and dangerous papers.' Practically all of his writings, including the manuscripts of his great legal works, his jewelry, money, and other valuables, and even his will, were seized under that warrant and carried away. His chambers at the Inner Temple were ransacked in the same manner. The havoc wrought by the custodians of these papers was wanton, and seven years elapsed before what remained was restored to his heirs at the request of the Long Parliament. His will, of great importance to his family, was never returned." pp. 30-32.

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"In 1643 an ordinance for the regulation of printing continued the severe censorship and allowed equally broad discretionary powers of search in enforcing its provisions. It was this ordinance which caused Milton to write his *Areopagetica*, pleading for a free press. . .

"In the colony of Virginia there was passed in 1643 what was probably the first legislative precedent of the Fourth Amendment, prohibiting the issue of blank warrants." Henning, *Statutes at Large*, I, 257-258. p. 33.

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"In the same period, in England, a new form of tax, the excise, was invented and imposed to

raise funds for the war against Charles, carrying with it an unlimited authority of invasion of private homes with which this tax was always later identified by the people...

"Many pamphlets appeared, denouncing the excise and the procedure of its enforcement. See citations in William Kennedy, *English Taxation* (London, 1913), p. 62n. In *Excise Anotomiz'd*, anonymously published in 1659, the writer lists as one of his grievances: "The uncivil Proceedings of the Officers thereof, who, upon every suspicion, and often malicious Information, come into our Houses, with armed men, and if not immediately let in, violently break open our Doors, to the great Affrightment and Amazement of our Wives, Children, and Families." (ed. 1733, p. 15.)" p. 34

"Incidentally, these statutes were to play leading roles in the events on both sides of the Atlantic that laid the permanent foundation for the principle of reasonable search and seizure. The first was the Licensing Act for the regulation of the press. It made provision for powers of search as broad as any ever granted by Star Chamber decree. The second was an act 'to prevent frauds and abuses in the custom.' One instrumentality to aid in its enforcement was the general writ of assistance. A third statute passed in the same year brought into existence the hated 'hearth money,' in the collection of which officials were given right of entry into all houses any time during the day...

"A proclamation was issued by Charles to suppress seditious libels and unlicensed printing and the chief justice, in turn, upon the basis of the proclamation, issued general warrants of search and arrest to enforce it...

"When Scroggs was impeached, one of the articles of impeachment was based on his issuance of 'general warrants for attaching the persons and

seizing the goods of his majesty's subjects, not named or described particularly, in the said warrants; by means whereof, many . . . have been vexed, their houses entered into, and they themselves grievously oppressed, contrary to law.' Here was a legislative recognition of the idea that general warrants were an arbitrary exercise of government authority against which the public had a right to be safeguarded. . .

"After the Revolution of 1688, another forward step was taken in acknowledgment of this privilege. One of the first acts of the new government, by insistance of King William himself, was to abolish 'hearth-money.' But what is of most interest here is the reason given for this action. The 'hearth-money,' declares the preamble of the statute, is not only a great oppression of the poorer classes, 'but a badge of slavery upon the whole people, exposing every man's house to be entered into, and searched by persons unknown to him.'" pp. 37-39

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"Great opposition was aroused in 1763 when the cider tax was passed, extending the excise laws to a commodity which would bring practically everyone into contact with the administration of these laws. William Pitt spoke against it, particularly against the dangerous precedent of admitting officers of the excise into private houses. The laws of excise were grievous to the trader, he said, but intolerable to the private person. The government admitted that the excise was odious but maintained it was necessary." p. 41

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"In the House of Lords a number of protests were filed by dissenting members 'because by this Bill our fellow subjects, who from the growth of their own orchards, make Cyder and Perry, are subjected to the most grievous mode of excise; whereby private houses of peers, gentlemen, freeholders, and

farmers are made liable to be searched at pleasure." Disturbances broke out in the cider counties and troops had to be moved into them. . .

"Earlier in the same year, 1760, when he was still attorney general and not yet on the bench, Hardwicke had argued with Walpole that the broad powers of search and seizure in enforcing the customs and excise laws were not unreasonable. Parliamentary History, VIII, 1289." p. 42

"In 1762, John Wilkes, then a member of Parliament, began to publish anonymously his famous series of pamphlets called *The North Briton*, deriding the ministers and criticizing the policies of the government.

"A warrant was issued by Lord Halifax, the secretary of state, to four messengers, ordering them 'to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, *The North Briton*, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers.'

"Here was a warrant, general as to the persons to be arrested and the places to be searched and the papers to be seized. Of course, probable cause upon oath could necessarily have no place in it since the very questions as to 'whom the messengers should arrest, where they should search, and what they should seize, were given over into their absolute discretion. Under this 'roving commission,' they proceeded to arrest upon suspicion no less than forty-nine persons in three days, even taking some from their beds in the middle of the night. Finally, they apprehended the actual printer of Number 45 and from him they learned that Wilkes was the author of the pamphlet. Wilkes was waiting for just such an opportunity, having on different occasions advised others to resist such warrants. He pro-

nounced the messengers' authority 'a ridiculous warrant against the whole English nation' and refused to obey it.

"All the printers, upon the suggestion and with the support of opponents of the government, brought suit against the messengers for false imprisonment. Chief Justice Pratt held the warrant to be illegal. 'To enter a man's house by virtue of a nameless warrant,' said the Chief Justice, 'in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour.' The London jury awarded the particular plaintiffs in the test cases damages of £300 and the other plaintiffs had verdicts of £200 by consent.

"Asked, once by Madame Pompadour how far the liberty of the press extended in England, Wilkes replied: 'I do not know. I am trying to find out.' Raymond Postgate, 'That Devil Wilkes' (London, 1930), p. 53." pp. 43-44

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 "'Wilkes and Liberty' became the byword of the times, even in far-away America.

"His correspondence with leading Americans in this period was also considerable." pp. 45-46

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 "In 1765, Pratt, now Lord Camden, delivered the opinion of the court, in *Entick v. Carrington*, an opinion which has since been denominated a landmark of English liberty by the Supreme Court of the United States. 'If this point should be decided in favor of the Government,' said the court, 'this warrant was specific as to the person but general as to papers, 'the secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.' An un-



reasonable power, the court went on, must have a specific foundation in law in order to be justified. *Boyd v. United States*, 116 U.S. 616, 6 Sup. Ct. 524, 29 L. ed. 746 (1886).²⁰ pp. 47-48

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"In April, 1766, the House of Commons resolved that general warrants in cases of libel were illegal. But this limited condemnation did not satisfy Pitt. He forced the House to declare that general warrants were universally invalid, except as specifically provided for by act of Parliament.

"One of Pitt's many eloquent remarks on these occasions, a sample of his great oratorical powers, has become classic." p. 48

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CHAPTER II

Writs of Assistance
In The Colonies

"From the standpoint of the more effective enforcement of trade laws, the convenience of general search warrants was very apparent. As pointed out in the preceding chapter, provision had been made for such warrants in like instances in England by the act of Charles II passed in 1662, by virtue of the broad terms of which any person who was authorized by a writ of assistance under the seal of the English Court of Exchequer could take with him a civil officer and search any house, shop, warehouse, etc.; break open doors, chests, packages, in case of resistance; and remove any prohibited or uncustomed goods or merchandise. Furthermore, an act of William III passed in 1696 contained the broad stipulation that the officers of the customs in America were to be given 'the same powers and authorities' and the 'like assistance' that officials had in England.

"These writs, which received their name from the fact that they commanded all officers and subjects of the Crown to assist in their execution, were even more arbitrary in their nature and more open to abuse than the general warrants of the North Briton cases. The warrants in those cases, it is true, authorized the apprehension of undescribed persons and the indiscriminate seizure of their papers, but they were connected with a particular case of libel and consequently were necessarily limited to some extent not only in object, but what is more important in time. In other words, the *warrants were not permanent* in the officers' hands to be used thenceforth to search for and seize the authors of all seditious libels and their papers. The more dangerous element of the writ of assistance, on the other hand, was that it was not returnable at all after execution, but was good as a continuous license and

authority during the whole lifetime of the reigning sovereign." pp. 53-54

"An examination of the Maryland Archives reveals a colonial writ of assistance of an earlier date than any the writer has seen mentioned before. This writ was issued by the Council of Maryland to Patrick Mein, Surveyor General of the Customs in Virginia and Maryland, on November 10, 1686, in response to his request for a writ of assistance 'as is usual in such cases.' The writ, however, did not recite any general powers of search and its sole purpose was to command assistance, but the fact is evident that the recitation in Mein's commission of general search powers was taken by everyone concerned, to be of itself sufficient authority in this regard. Indeed, the commission itself reads like a general writ of assistance. Archives of Maryland (Baltimore, 1887), V, 521-524.

"Besides the fact of the early date, this material is interesting in several respects. First, it seems to demonstrate that in those early times and for a long time afterwards the officers were permitted to search any time and any place upon the sole authority of their commissions, and that at an early date after the passage of the statute 13 and 14 Char. II (1662) the writ of assistance itself was not looked upon as any authorization of general search. Second, the statute passed in 1672 cited in Mein's commission for his right of general search (25 Char. II, ch. 7) does not appear to give any such power. Third, the date of the incident was ten years before the statute 7 and 8 Wm. III, which purported to give the same authorities to the customs officers in America that those in England had. The general power to search in the commission, accordingly, does not seem to have been based upon any legislative sanction but only upon the authority of the customs administration." pp. 55-56

"In February of 1761, all writs of assistance expired [due to the death of the sovereign six months before]. Sixty-three Boston merchants immediately petitioned the court for a hearing on the question of granting new writs. The merchants were represented by the younger James Otis.

"Otis completely electrified the large audience in the court room with his denunciation of England's whole policy toward the Colonies and with his argument against general warrants. John Adams, then a young man less than twenty-six years of age and not yet admitted to the bar, was a spectator, and many years later described the scene in these oft-quoted words: 'I do say in the most solemn manner, that Mr. Otis's oration against the Writs of Assistance breathed into this nation the breath of life.' He 'was a flame of fire! Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free.'

"Otis contended that since general warrants were not sanctioned by the common law, the writ of assistance mentioned in the act of 1662 should be construed as special like the writ of assistance provided for in the earlier act passed in 1660, especially since the later statute did not give a clear definition of the writ. If this statute, passed in the reign of Charles II when arbitrary power was pushed to an extremity, did authorize general warrants, then, he maintained, it was unconstitutional, repugnant to Magna Carta. And foreshadowing the great principle of American Constitutional law, he argued that an act against the Constitution, on the authority of Lord Coke in *Dr. Bonham's Case*, was void.

"Here was an instrument that appeared to him 'the worst instance of arbitrary power, the most destructive of English liberty, that even was found in an English law book.'" pp. 57-59

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"It is usually overlooked that in the very midst of the first few days of July, 1776, just at the moment that 'the child Independence,' to use Adams' phrase, had grown to manhood, when Adams was taking the leading part in putting through the Second Continental Congress the resolution of independence, he fittingly recalled and gave a merited importance to the incident which had done much to inspire his career. 'When I look back to the year 1761,' he wrote to his wife on the morning of July 3, 1776, communicating the news of the action of Congress in passing the resolution, 'and recollect the argument concerning writs of assistance, in the superior court, which I have hitherto considered as the commencement of the controversy between Great Britain and America, and recollect the series of political events, the chain of causes and effects, I am surprised at the suddenness of this revolution.'" p. 61

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"And a short while later, with regard to the Malcom affair in Boston, where the execution of a writ of assistance had been resisted by a merchant, the attorney general and solicitor general advised that no civil action or criminal prosecution could be brought against any of the parties who obstructed the officers inasmuch as the writ of assistance by virtue of which they entered the house and cellar was not a legal authority. Particular care seems to have been taken, however, from obvious motives of prudence and expedience, that these opinions, which in effect held illegal every search and seizure ever made in the Colonies under a writ of assistance, should not reach the public ear. . .

"With his argument in the *Writs of Assistance Case*, Otis had secured his election to the General Assembly by an overwhelming majority and for ten years he was the leading spirit there in bringing on the American Revolution. . .

"John Adams writes: 'On the week of his election I happened to be at Worcester, attending the Court of Common Pleas, of which Brigadier Ruggles was Chief Justice, when the news arrived from Boston of Mr. Otis' election. You can have no idea of the consternation among the government people. Chief Justice Ruggles . . . said, 'Out of this election will arise a damned faction, which will shake this province to its foundation.' Ruggles' foresight reached not beyond his nose. That election has shaken two continents, and will shake all four.' Adams to Tudor, March 29, 1817, Works of John Adams, X, 248." pp. 65-66

"The whole customs system partook too much of 'burning a barn to roast an Egg,' a procedure naturally annoying, adds James Truslow Adams, to the owner of the barn. J. T. Adams, p. 296, citing Ingersoll Papers, p. 297." p. 68

"It was not very long before the sincerity of the colonists with respect to general warrants was put to the test and found incapable of standing the strain of extreme circumstances. On August 28, 1777, Congress, then in session in Philadelphia, received information that a large British army had landed at the head of the Chesapeake. It thereupon recommended to the Supreme Executive Council of Pennsylvania the arrest of certain persons, most of them Quakers, who had shown a disposition inimical to the American cause, 'together with all such papers in their possession as may be of a political nature.' Congress also recommended the seizure of the records

and papers of the Meeting of Sufferings, and institution of the Quakers.

"These persons were arrested together with a number of others, many of them citizens of wealth and influence. There was neither trial nor hearing. They were hurried to confinement, their houses were searched, and desks were broken open in a general fishing expedition for compromising papers. Twenty-three of these people who were being detained at Mason's Lodge prepared a remonstrance to the President and Council of Pennsylvania. This interesting document set forth the ninth and tenth sections of the Pennsylvania Declaration of Rights adopted just the year before, the ninth guaranteeing the essentials of a fair trial, and the tenth prohibiting general warrants. It went on to declare that the warrant issued by the Council had authorized the messengers to search all papers on the bare possibility that something political might be found, but without the least ground for a suspicion of the kind. . .

"The whole record bespeaks half-hearted action and the feeling of shameful necessity. The prisoners were ordered sent to Virginia, notwithstanding the issuance of a writ of habeas corpus by Chief Justice McKean, which the state authorities disregarded. . .

"It is exceedingly doubtful that such an occurrence would have taken place in more normal times. But it brings to mind what James Madison said twelve years later, that wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested majority in a democracy than by a powerful and interested prince in a monarchy. . .

"Madison to Jefferson, October 17, 1788, in Writings of James Madison (Gaillard Hunt, ed., New York, 1904), V, 272 ff. 'Experience proves the inefficacy of a bill of rights on those occasions when

its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . .Wherever the real power in a Government lies, there is the danger of oppression." pp. 76-78

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CHAPTER III

The Fourth Amendment

"Gerry, writing under the nom de plume 'A Columbian Patriot,' fittingly epitomized this objection for his state in the following interesting passage: 'There is no provision by a bill of rights to guard against the dangerous encroachments of power in too many instances to be named: but I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence—the daring experiment of granting writs of assistance in a former arbitrary administration is not yet forgotten in the Massachusetts; nor can we be so ungrateful to the memory of the patriots who counteracted their operation, as so soon after their manly exertions to save us from such a *detestable* instrument of arbitrary power, to subject ourselves to the *insolence* of any petty revenue officer to enter our houses, search, insult, and seize at pleasure.' Federalist and Other Constitutional Papers, II, 723. It is interesting to note that the question of search and seizure was the first illustration seized upon by both Less and Gerry as indicative of the necessity of a bill of rights." p. 89

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"[In debate in the Virginia Legislature, on the cutting question of the addition to the Constitution of a Bill of Rights,] Patrick Henry . . . dwelt upon the oppressions of state sheriffs and pointed out the greater possibilities in the case of federal sheriffs acting under distant superiors:

"When these harpies are aided by excisemen, who may search, at any time, your houses and most secret recesses, will the people bear it? If you think so, you differ from me. Where I thought there was a possibility of such mischiefs, I would grant power with a niggardly hand; and here there is a strong possibility that these oppressions shall actually hap-

pen. I may be told that it is safe to err on that side, because such regulations may be made by Congress as shall restrain these officers, and because laws are made by our representatives, and judged by righteous judges: but, sir as these regulations may be made, so they may not; and many reasons there are to induce a belief that they will not." p. 92

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"... In the present Constitution (of Virginia) they (the authorities) are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of a commission of a fact, etc. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred! The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the General government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, or wear. They ought to be restrained within proper bounds." p. 93

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"Adopted by the Virginia Convention [were a *recommendatory* bill of rights:]

'14th. That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or

describing the place or person, are dangerous, and ought not to be granted." p. 95

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"In Maryland, a committee appointed to prepare amendments adhered closely to the provision in the Maryland Declaration of Rights as regards search and seizure. See note 12, above. A report of the committee's deliberations states the following: 'This amendment was considered indispensable by many of the Committee; for Congress having the power of laying excises (the horror of a free people), by which our dwelling houses, those castles considered so sacred by the English law, will be laid open to the insolence and oppression of office, there could be no constitutional check provided that would prove so effectual a safeguard to our citizens. General warrants, too, the great engine by which power may destroy these individuals who resist usurpation, are also hereby forbidden to those magistrates who are to administer the general government.' Subsequently however, the controlling Federalist majority decided as a matter of policy not to advocate any amendments at all so as to give the approbation of the state the most favorable aspect possible in view of the approaching struggles in the pivotal states. Elliot's Debates, II, 547-556." p. 96

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"On May 4, 1789, four days after Washington's inauguration, Madison had already given notice of his intention to bring up, before Congress, the subject of amendments." p. 98

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"In discussing the matter in Congress, with special references to the 'necessary and proper' clause, he showed the influence of the debate in the Virginia Convention the year before:

... 'The General Government has a right to pass all laws which shall be necessary to collect its reve-

nue; the means for enforcing the collection are within the discretion of the Legislature; may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government."

"... It is interesting to note that general warrants were to him the most prominent illustration (as it was to others, e.g., Gerry, note 40, above) of the need of a bill of rights." p. 99

"The general right of security from unreasonable search and seizure was given a sanction of its own (as finally adopted) and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment.

"Cf. Fraenkel, Harvard Law Review, XXXIV, 366. Cf. also such cases as *Boyd v. United States*, 116 U.S. 616, 29 L. ed. 746, 6 Sup. Ct. 524 (1886); *Hale v. Henkel*, 201 U.S. 43, 50 L. ed. 652, 26 Sup. Ct. 370 (1906)." p. 103

"The amendments once ratified,' states one writer, 'all notes of opposition were lost in the chorus of admiration that resounded from every quarter. In the worship of the Constitution that instantly succeeded, men forgot that it had been 'extorted from the grinding necessity of a reluctant people.' . . . It was almost impossible to believe that an instrument, accepted by all parties as the last word of

political wisdom, had been produced in a conflict of opinion, adopted with doubt, ratified with hesitation, and amended with difficulty.' Smith, in Jameson's Essays in Constitutional History, pp. 114-115." p. 105

APPENDIX B

LAWS OF MARYLAND, NOV. 1789, c. VIII SEC. V

Penalty on
selling bread
not sufficient-
ly baked, &c.

V. And be it enacted, That if any person or persons whatsoever shall, after the first appointment of assessors in any city or town within their respective counties, make for sale, sell or expose to sale, any of the several sorts of bread aforesaid, within the places aforesaid, which shall not be sufficiently baked, or marked with the mark, and of the weight and fineness, directed by this act, every such person or persons offending in the premises shall forfeit all such bread so deficient in weight or fineness, and not marked as aforesaid; and that it shall and may be lawful to and for the clerk of the market, or such person or persons as the aforesaid assessors shall respectively appoint; at least twice in every month, to examine and weigh all such bread, and to seize, for the use of the poor of the county, all such as they shall find deficient in weight or fineness, and not baked or marked as aforesaid; and if any baker, or other person, shall refuse to suffer the clerk of the market, or the person or persons appointed as aforesaid, to enter his house, or other suspected place, to examine and weigh his bread, he shall forfeit and pay the sum of five pounds current money for every such offence, and the clerk of the market, or person or persons appointed as aforesaid, shall have one third part of such penalty for his trouble, and shall deliver the other two thirds to the overseers, or other managers, of the poor of the place or county where such penalty shall be incurred, for the use of the poor.



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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1966

No. 92

ROLAND CAMARA, *a*

Appellant,

vs.

MUNICIPAL COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO,

Respondent.

On Appeal from the Judgment of the District Court of Appeal,
State of California, First Appellate Division

APPELLANT'S OPENING BRIEF

OPINION BELOW

The opinion of the District Court of Appeal is reported in 237 Cal.App.2d 128, 46 Cal.Rptr. 585 (1965), and is reproduced on pages 60-71 of the printed record. The order of the Superior Court denying the writ of prohibition is unreported and is reproduced on page 27 of the printed record.

JURISDICTION

The judgment of the District Court of Appeal was filed on September 22, 1965. (R. 60.) A timely petition for hearing before the Supreme Court of California was denied on November 16, 1965, with Justices Peters and Peek voting for a hearing. (R. 72.) Notice of appeal was filed in the District Court of Appeal on December 20, 1965. (R. 73.) On October 10, 1966, this Court noted probable jurisdiction and ordered the case placed on the summary calendar. (R. 96.)

The jurisdiction of the Supreme Court of the United States to review the decision below is conferred by Title 28, United States Code, Section 1257(2).

STATUTES INVOLVED

Section 503 of the San Francisco Municipal Housing Code provides:

"Right to Enter Building. Authorized employees of the City Departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

Section 507 of the Code provides:

"Penalty for Violation. Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code, or any order of the Su-

perintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment, not exceeding six months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue. * * *"

QUESTIONS PRESENTED

I

Whether Section 503 of the Housing Code of the City and County of San Francisco, authorizing City employees to inspect private dwellings such as appellant's without warrant or probable cause for such inspections, and Section 507 of the Housing Code making refusal of such inspections a crime, are unconstitutional as authorizing unreasonable searches in violation of the Fourth and Fourteenth Amendments.

II

Whether Sections 503 and 507 of the Housing Code violate the First, Fourth, Fifth, Ninth and Fourteenth Amendments by allowing a search for evidence without warrant, arrest or emergency.

STATEMENT OF FACTS

Appellant is charged in the Municipal Court of the City and County of San Francisco, State of California, with a misdemeanor on the basis of a written complaint charging that on November 22, 1963, he violated Section 507 of the San Francisco Municipal Housing Code by refusing a public health inspector entry into his dwelling for the purpose of making an inspection under the provisions of Section 503 of the Code. (R. 5.)

Section 503 of the San Francisco Municipal Housing Code authorizes city employees in the performance of their duties at reasonable times to enter any building, structure or premises in San Francisco. Section 507 makes it a criminal act to resist or oppose any provision of the Housing Code. Neither a warrant nor probable cause is necessary to allow a city employee to demand entry into one's home under Section 503. And if a resident refuses entry to the city employee into his home, the resident faces a criminal charge under Section 507 despite the absence of either a warrant or probable cause.

On November 6, 1963, Inspector Nall of the Division of Housing Inspection of the Department of Public Health of San Francisco entered the premises at 225 Jones Street, an apartment house. (R. 1-2.)¹ The inspector claimed the existing permit of occupancy did not allow residential use on the ground floor. (R. 18.)

¹This statement of the events which occurred is based upon the facts pleaded in the Petition for Writ of Prohibition (R. 1-4) and the Answer to the petition (R. 18-20). Only those facts admitted by respondent (either expressly or by failure to deny) or alleged by respondent are set forth.

The purpose of the inspector's presence was to make a routine annual inspection of apartment houses for the purposes of licensing and issuing a permit of occupancy. (R. 19.) Nall learned from the building manager that appellant leased the store on the ground floor of the building and lived in the rear. Nall questioned appellant, who readily admitted such occupancy. (R. 1, 18.) Nall requested permission to inspect appellant's apartment, but appellant declined to let him enter when he learned that Nall did not have a search warrant. (R. 2, 19.)

Nall returned to the premises on November 8, 1963, and appellant again declined to allow him entry to inspect. (R. 19.)

Subsequent to November 8 a notice was mailed to appellant at 223 Jones Street requesting him to appear at the office of the District Attorney on November 22 as to a violation of Section 507.

On November 22, Nall returned to the premises with Inspector John M. Reid. They did not have a warrant or written complaint. (R. 2, 20.) Reid told appellant that it was the responsibility of the Department of Public Health to ensure conformance with the Housing Code and with the existing occupancy permit. He also informed appellant that the building where appellant lived could not have a dwelling on the ground floor and so it was illegal for appellant to occupy the ground floor as a residence. Reid again requested permission to inspect appellant's dwelling and appellant again declined to give permission to enter. (R. 20.)

The inspectors did not have a warrant or written complaint on any of these occasions. At all times appellant readily admitted that he resided on the ground floor. No reason for inspecting appellant's residence was given other than his occupancy, which appellant admitted.² No emergency was involved. There was ample time between November 6th and November 22nd to obtain a search warrant (if the situation required it) or to serve an eviction notice (if the law required it). But the inspectors demanded the right to enter and search.

Appellant was arrested on December 2, 1963, after the filing of a complaint charging him with violation of Section 507 because of his refusal on November 22, 1963, to allow an inspection of his home as authorized by Section 503. (R. 3, 5-6.)

A demurrer to the complaint was filed in the Municipal Court (R. 7-8) where the action was to be tried, but that Court ruled that Section 503 was constitutional and set the matter for trial. Appellant applied for a writ of prohibition in the Superior Court and in doing so raised the constitutional issues involved in this appeal.³ (R. 3-4, 9-16.) An alternative writ of prohibition was issued requiring the Municipal Court

²Whether or not appellant's residence was in fact legal for occupancy as an apartment is of no relevance here. Neither appellant nor his landlord have ever been charged with failure to abide by a permit of occupancy. If the occupancy was illegal, nothing in the interior of the apartment could change that fact.

³In California, a trial court lacks jurisdiction to proceed with the trial of a criminal case if the statute allegedly violated is unconstitutional and this matter is called to its attention. *Whitney v. Municipal Court*, 58 Cal.2d 907, 911 (1962).

to show cause why the prosecution should not be prohibited. (R. 16-17.) The issues raised by this appeal were argued orally at the hearing for the permanent writ of prohibition. (R. 30-60.) The trial Court denied the permanent writ and the alternative writ was dissolved on the express ground that section 503 was not unconstitutional. (R. 27.) An appeal from the judgment of the trial Court was taken to the District Court of Appeal. The latter Court affirmed the decision of the Superior Court and in doing so expressly ruled that the ordinances involved did not violate the Fourteenth or Fourth Amendments. (R. 60-71.) A petition for a hearing before the Supreme Court of California was denied, with two Justices dissenting. (R. 72.)⁴

SUMMARY OF ARGUMENT

The Fourth Amendment provides for "the right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures" This protection is applicable to State action as well as federal action. *Mapp v. Ohio*, 367 U.S. 643, 6 L.ed.2d 1081 (1961). In the absence of an emergency, this protection includes the necessity of a search or arrest warrant before one's home may be entered by a governmental official without consent. *Weeks v. United States*, 232 U.S. 383, 58 L.ed. 652 (1914); *Agnello v. United States*, 269 U.S. 20, 70 L.ed. 145 (1925); *Sil-*

⁴The trial of the case is awaiting the outcome of this appeal and it is conceded that if Section 503 of the Housing Code is not unconstitutional, appellant has no defense. This concession was noted in the opinion of the District Court of Appeal, R. 61.

verman v. United States, 365 U.S. 505, 5 L.ed.2d 734 (1961). The decision in *Frank v. Maryland*, 359 U.S. 360, 3 L.ed.2d 877 (1959) removes this security by allowing a health inspector the authority to demand entrance to one's home without a warrant. That case failed to interpret properly the history leading to the Fourth Amendment or the broad meaning given to that Amendment by other decisions of this Court. The *Frank* decision should be overruled. The justification for the exception created for health inspectors in that case, the importance of protecting the public health, is inadequate and unavailing in the face of the guarantees of the Fourth Amendment.

Alternatively, only if the Court is unwilling to overrule *Frank v. Maryland*, the decision below should be reversed because the ordinance under which the inspector sought entrance does not even require that he have probable cause to justify his search or the criminal penalty for resistance to the search.

This case also raises the issue of whether *Frank v. Maryland* is compatible with *Griswold v. Connecticut*, 381 U.S. 479, and whether the latter case has not overruled *Frank* as well as other previously authorized invasions of the right of privacy such as the wire tapping case, *Olmstead v. United States*, 277 U.S. 438.

ARGUMENT

“To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which

no Englishman would wish to live an hour; it was the most daring public attack made on the liberty of the subject."

The Lord Chief Justice on "The North Briton" affair in *Huckle v. Money*, 95 Eng. Rep. 768 (1763).

I

TO ALLOW AN ADMINISTRATIVE OFFICIAL TO ENTER A PRIVATE HOME WITHOUT A WARRANT, IN THE ABSENCE OF CONSENT OR AN EMERGENCY, IS TO VIOLATE THE SECURITY PROTECTED BY THE FOURTH AND FOURTEENTH AMENDMENTS.

1. Searches of homes without a warrant are unreasonable in the absence of consent or emergency.

This Court has long recognized that the provisions against unreasonable search in the Fourth Amendment are fundamental constitutional protections and that basic among these protections is the privacy of one's home against governmental intrusion without a search warrant. E.g., *Weeks v. United States*, 232 U.S. 383, 58 L.ed. 652 (1914); *Agnello v. United States*, 269 U.S. 20, 70 L.ed. 145 (1925); *Silverman v. United States*, 365 U.S. 505, 5 L.ed.2d 734 (1961). The constitutional protection is so strong that a search warrant is required even though the official seeking to search has in his possession facts which unquestionably show probable cause that the search is justifiable. *Agnello v. United States*, 269 U.S. at 33, 70 L.ed. at 149. The values thus protected are described in *McDonald v. United States*, 335 U.S. 451, 453, 93 L.ed. 153, 157 (1948):

"This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike. It marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation."

Factors which can make a warrantless search reasonable, namely, emergency circumstances (*Carroll v. United States*, 267 U.S. 132, 153, 69 L.ed. 543, 551), free consent (*Zap v. United States*, 328 U.S. 624, 90 L.ed. 1477), or incidental to a lawful arrest (cf. *United States v. Rabinowitz*, 339 U.S. 56, 94 L.ed. 653 (1950), with *Trupiano v. United States*, 344 U.S. 699, 92 L.ed. 1663 (1948)) are not present here, nor were they present in *Frank v. Maryland*.

The constitutional protection applies not only to federal officials under the Fourth Amendment but is also enforceable against the States through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 6 L.ed.2d 1081 (1961).

2. The law declared in *Frank v. Maryland* breaches the security of the home meant to be protected by the Fourth Amendment.

The Fourth Amendment protects "the right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."

The security of the people against unreasonable searches was breached by the decision of *Frank v.*

Maryland, 359 U.S. 360, 3 L.ed.2d 877 (1959). By a vote of 4-1-4, this Court upheld the conviction of the defendant for his refusal to allow a health inspector to enter his home in the absence of a search warrant. The explanation given by the main opinion in *Frank* was that the thrust of Fourth Amendment prohibition of unreasonable searches and seizures was directed towards implementing the provisions of the Fifth Amendment prohibiting self-incrimination in a criminal case. Therefore, since an attempted search by a health inspector is not part of a criminal proceeding, the constitutional protection was not available. 359 U.S. at 365-66, 3 L.ed.2d at 881-82.

This interpretation of the Fourth Amendment is incompatible with its historical development and with the decisions of this Court interpreting that Amendment. *Frank v. Maryland* should be overruled. It gravely weakens the Fourth and Fourteenth Amendments by failing to protect the security of the individual from the intrusion into his home of a host of state and local officials for a myriad of reasons. "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan*, 378 U.S. 1, 5, 12 L.ed.2d 653, 657 (1964).

The history of the events leading to the adoption of the Fourth Amendment shows that the evil to be prevented was not limited to searches to obtain

evidence for criminal proceedings, but extended to all instances of governmental intrusion into one's home. The Court is already familiar with the historical development of the Fourth Amendment from its own decisions.⁵ This brief presents the more significant illustrative episodes.

Certainly the landmark decision concerning the protection of one's home from intrusion is *Entick v. Carrington*, 19 Howell's St. Tr. 1029 (1765). This was a civil action for trespass by Entick, a publisher, against certain governmental officials who under authority of a general warrant entered his establishment and seized his private papers. The warrant failed to specify the papers to be seized. The decision of Lord Camden in awarding damages for trespass is couched in terms of protecting the security of one's property. "... every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license but he is liable to an action though the damage be nothing * * *" This opinion was described thusly by Justice Bradley, speaking for the Court:⁶

"The principles laid down in this opinion affect the very essence of constitutional liberty and

⁵*Boyd v. United States*, 116 U.S. 616, 625-630, 29 L.ed. 746, 749-51 (1886); *Marcus v. Property Search Warrant*, 367 U.S. 717, 724-729, 6 L.ed.2d 1127, 1132-35 (1961); *Stanford v. Texas*, 379 U.S. 476, 481-484, 13 L.ed.2d 431, 434-36 (1965). See also, e.g., Landynski, *Search and Seizure and the Supreme Court*, 19-48 (1966); Barrett, "Personal Rights, Property Rights, and the Fourth Amendment," 1960 Sup. Ct. Rev. 46, 70-71; Note, 15 Buffalo L. Rev. 456 (1966).

⁶*Boyd v. United States*, 116 U.S. 616, 630, 29 L.ed. 746, 751 (1886).

security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life."

In the many debates in the American colonies over the arbitrary nature of use of writs of assistance and general warrants to sanction the search of private establishments, the language is clear that all types of intrusions, not merely those to obtain criminal evidence, are condemned. In the 1761 debates as to whether the colonial court in Massachusetts had the authority to issue writs of assistance, James Otis is reported to have said in substance that the writ "is against the fundamental principles of law, the privilege of the house. A man who is quiet is as secure in his home as a prince in his castle, notwithstanding all his debts and civil procedures of any kind."⁷ When later Patrick Henry opposed the adoption of the Constitution without a Bill of Rights he contended that otherwise "excisemen . . . may . . . go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear."⁸

These examples show that the concern of the Great Debates of the Eighteenth Century over the authority of government to search private homes and seize

⁷As quoted from the notes of John Adams in Landynski, *Search and Seizure and the Supreme Court* 34 (1966). A similar statement appears in Barrett, "Personal Rights, Property Rights, and the Fourth Amendment," 1960 Sup. Ct. Rev. 46, 71.

⁸Elliot, *Debates* 448-49, as it appears in Barrett, *id.* at 71.

private papers was directed against *all* such situations, not merely those where evidence for a criminal trial was being sought. As Dean Bargett of the School of Law of the University of California at Davis has stated, these men "were primarily interested in protecting the homes of ordinary persons against indiscriminate and unreasonable governmental invasions. They did not regard the great issue of liberty to be protection against searches for evidence to be used in criminal prosecutions."⁹

The broad language used by decisions of this Court prior to *Frank v. Maryland* carried forward this historical tradition and understanding. In the first significant decision concerning the Fourth Amendment, *Boyd v. United States*, 116 U.S. 616, 630, 29 L.ed. 746, 751 (1886), the Court stated that the protections against unreasonable searches and seizures "apply to all invasions on the part of government and its employees of the sanctity of a man's home and privacies of life." The landmark case of *Weeks v. United States*, 232 U.S. 383, 391-92, 58 L.ed. 652, 655 (1914), holds:

"The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, *whether accused of crime or not*,

⁹Barrett, *id.* at 71.

and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws." (Emphasis added.)

In *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298, 307 (1924), the Court carefully narrowed the investigative scope of a federal regulatory statute in order to avoid a violation of the Fourth Amendment. The Court in *Agnello v. United States*, 269 U.S. 20, 32, 70 L.ed. 145, 149 (1925), stated: "The search of a private dwelling without a warrant is *in itself* unreasonable and abhorrent to our laws."¹⁰ And *Davis v. United States*, 328 U.S. 582, 90 L.ed. 1453 (1946), stated:

"It [the law of searches and seizures] reflects a dual purpose—protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him." [328 U.S. at 587.]

And, then came *Frank v. Maryland*, representing, in the words of Dean Barrett, "a startling reversal of position."

Fortunately, decisions of this Court since *Frank* have not accepted this reversal of position. They have continued to recognize the broad scope of the constitutional protection against unreasonable searches and seizures. In *Mapp v. Ohio*, 367 U.S. 643, 657, 6 L.ed.

¹⁰Emphasis added. See also *Neuslein v. District of Columbia*, 115 F.2d 690, 692-93 (D.C. Cir. 1940), for a valuable discussion on this point.

2d 1081, 1091 (1961), the Court remarked that the purpose of both the Fourth and Fifth Amendments, "complementary to, although not dependent upon, that of the other", is "to maintain inviolate large areas of personal privacy." In *Marcus v. Property Search Warrant*, 367 U.S. 717, 724-29, 6 L.ed.2d 1127, 1132-35 (1961), it was pointed out that unreasonable searches were forbidden by the Fourth Amendment not only to prohibit the collection of evidence to be used to incriminate; but also to prohibit the suppression of public expression—a ground independent of the Fifth Amendment. In *Stanford v. Texas*, 379 U.S. 476, 13 L.ed.2d 431 (1965), the Court reviewed once again the antecedents and application of the Fourth Amendment and reaffirmed that its broad purpose was to assure that the people of this Nation are "secure in their persons, houses, papers and effects." The Court did not limit this security to criminal affairs. On the contrary, the strength of the decision is in the refusal of the Court to allow the unreasonable search to be an instrument of political oppression.¹¹

We submit that the time is now proper for this Court to repudiate the special and restrictive exceptions to the guaranties of the Fourth Amendment

¹¹"No less a standard could be faithful to First Amendment freedoms." 379 U.S. at 485; 13 L.ed.2d at 437. In *Stanford* the defendant was convicted of a violation of the anti-Communist legislation of the State of Texas. The search warrant issued was so sweeping in its language that it was no warrant at all under the Fourth and Fourteenth Amendments. The quantity of defendant's books, writings and other documents seized without legal warrant illustrates the obvious attempt to stifle the defendant's right to speak and otherwise communicate.

carved out for "inspectors" in *Frank v. Maryland* and to prevent State courts from derogating the protections of the Fourth Amendment by relying upon the *Frank* decision.¹² In this way the Court can secure its recent statement that:

"The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."¹³

It may be that the decision in *Frank* can be explained as a distinction drawn between the security provided by the Fourth Amendment and the security provided by the Fourteenth Amendment. When the *Frank* decision came down, *Wolf v. Colorado*, 338 U.S. 25, 93 L.ed. 1782 (1949), allowed such a distinction as to the application of the exclusionary rule. Now *Mapp v. Ohio*, 367 U.S. 643, 6 L.ed.2d 1081 (1961), has overruled *Wolf* and brought to bear against the *Frank* decision the full weight of the historical development of the Fourth Amendment as a protection of privacy against all warrantless intrusions.¹⁴

¹²See text at note 28, *infra*.

¹³*Silverman v. United States*, 365 U.S. 505, 511, 5 L.ed.2d 734, 739 (1961).

¹⁴See also *Aguilar v. Texas*, 378 U.S. 108, 12 L.ed.2d 723 (1964) discussing the effect of the *Mapp* decision.

3. To grant immunity to the "inspector" from the requirement of a search warrant is both improper and unnecessary.

The claim that the requirement of a search warrant was not necessary in a health inspection of one's home was answered in a Circuit Court decision antedating *Frank v. Maryland, District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949); affirmed on other grounds, 339 U.S. 1, as follows:

"To say that a man suspected of a crime has a right to protection against search of his home, without a warrant, but that a man not suspected of a crime has no such protection, is a fantastic absurdity."¹⁵

This anomalous consequence, which became law in the *Frank* case, was also commented upon by Dean Barrett:

"[As a result of *Frank v. Maryland*] those types of governmental invasions of privacy most likely to involve the law-abiding person are subjected to the least restraint, those directed primarily against persons suspected of crime to the greatest."¹⁶

Another example of the peculiar distinctions to be drawn as a result of *Frank v. Maryland* is illustrated by *People v. Laverne*, 14 N.Y.2d 304, 200 N.E.2d 441 (1964). Under authority of an ordinance allowing the

¹⁵178 F.2d 13, 17 (D.C. Cir. 1949).

¹⁶Barrett, "Personal Rights, Property Rights, and the Fourth Amendment," 1960 Sup.Ct.Rev. 46, 71-72. Needless to say, neither Dean Barrett nor appellant argues that an acceptable cure for this anomaly is to reduce the protection accorded to those suspected of criminal violations to the level of those not suspected of crimes under the *Frank* holding.

inspection of private dwellings without a warrant, a health inspector inspected the defendant's home and found violations of the health laws. The defendant was convicted of these violations. Obviously constrained to an obedience to the *Frank* decision—and disturbed by it—a divided New York Court of Appeals nevertheless found a way to reverse the conviction. It found a distinction in that *Frank* was not concerned with the question of conviction of the health ordinance violation for which the inspector purports to be seeking. The court therefore ruled that the evidence obtained in a health inspector's search without a warrant could not be used to obtain a criminal conviction. Such a distinction certainly gives municipal authorities a peculiar choice. If a city uses the freedom of action that *Frank* offers to enforce its health laws, it cannot punish the violations which are discovered or coerce their correction by threat of criminal conviction.

Is there rational ground for a difference in search warrant requirements depending upon whether the municipal official making the search is a police officer or a health inspector? Certainly the requirement of the warrant is not meant to prevent a proper search. The interposition of a magistrate in determining whether a search (or inspection) should be allowed is not to deny a proper search, but it is merely to determine whether the circumstances for a proper search exist. What the Constitution does is to enjoin that the official who desires to make the search should not himself have the authority to determine whether it is

proper.¹⁷ If in fact probable cause exists for the search or inspection, the judicial officer will allow it to proceed. *Johnson v. United States*, 333 U.S. 10, 13-14, 92 L.ed. 436, 440 (1948); *McDonald v. United States*, 335 U.S. 451, 455-56, 93 L.ed. 153, 158 (1948).

The argument presented for eliminating this judicial protection is one of utility. It is claimed that evidence of health violations may only be discoverable upon internal inspection of houses. It is claimed that to protect the public health large municipal areas must be regularly inspected without individual probable cause thus making warrants unobtainable on an individual basis. What is desired is a statutory general warrant for every home in the area to be searched.

Arguments of utility have been frequently made in attempts to overcome constitutional protections, but they are just as frequently rejected. Lord Camden himself in *Entick v. Carrington* found no force in the argument that a general warrant is a great assistance in convicting criminals, noting that it was not allowed in crimes more heinous than seditious publication. This Court also has refused to accept such an argument. It certainly simplifies police work if, for example, the policeman is not required to inform the accused of his right to remain silent and to have counsel, and yet this Court has required that such information be given. *Miranda v. Arizona*, 384 U.S.

¹⁷"The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case." *Stanford v. Texas*, 379 U.S. 476, 485, 13 L.ed.2d 431, 437 (1965).

436, 16 L.ed.2d 694 (1966). There is no doubt that more criminals would be convicted if the Constitution allowed every home to be searched and the evidence which was turned up to be used against the accused. See *Weeks v. United States*, 232 U.S. 383, 58 L.ed. 652 (1914); *Mapp v. Ohio*, 367 U.S. 643, 6 L.ed.2d 1081 (1961). Similarly, it would be "easier" if federal law enforcement officials could rely on evidence gathered by state officials, even if illegally; this "silver platter" doctrine has been rejected by this Court. *Elkins v. United States*, 364 U.S. 206, 4 L.ed.2d 1669 (1960).

We submit that the factors motivating the courts to advance the exclusionary rule and to reject the "silver platter" doctrine in order to protect the privacy of the home are equally involved in determining that the health inspector, as well as the police officer, should have a search warrant before he attempts to enter the home.

In addition, it has never been demonstrated that the protection of the public health requires casting aside this guarantee against improper governmental intrusion into one's home. If the health inspector must carry on an areawide survey, it would seem from the paucity of cases involving resistance that most of the residents of the area welcome him. In those situations where the occupant will not allow him to enter, will not in almost all instances an inspection of the exterior, complaints from neighbors or the process of elimination of other causes of a specific effect show grounds upon which a search warrant could issue?

In the instant case, for example, there was no need for a warrantless search to determine if the health laws had been violated. Information obtained from the building manager, from public documents, and from appellant himself established the facts which were the alleged justification for the demand to search. (R. 1, 18.) The record in *Frank* itself is equally clear that a visual inspection of the outside of the premises disclosed facts upon which a search warrant could have been issued. However, in both these cases the government official *still* sought entrance into the home without judicial approval.

What remains is that small number of situations in which, especially in an areawide inspection *in which no one is even suspected* of a health violation, a home might contain a violation which is otherwise undiscoverable because the occupant insists on privacy. If it is here where we must choose, then the proper choice is with the Constitution and not against it. The "right of the people to be secure in their . . . houses," which right includes the protections of a search warrant, should prevail.

It is avoiding the issue to justify a search under these circumstances without a warrant by referring to the "reasonableness" of officials guarding public health in urban areas. Crime itself constitutes a hazard in urban areas and yet search warrants are required. As four Justices stated in *Frank v. Maryland*, 359 U.S. 360, 382, 3 L.ed.2d 877, 891 (1959) (dissent):

"One invasion of privacy by an official of government can be as oppressive as another. Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements. * * *

4. Administrative searches, if left free of constitutional restrictions, could subvert the Fourth Amendment.

Whether a warrant should be required before a administrative search, without consent, may take place is increasingly important in our society today. Searches for evidence of crime must compete with searches for untaxed imports, with searches by health inspectors seeking to protect the public health, and with searches by zoning inspectors seeking to conform land use. The welfare official may seek entrance to determine if the public assistance laws are being followed or children are being properly cared for or educated. Will not the tax assessor follow suit to determine whether personal property is being reported? Who else will follow him?¹⁸ In each case the privacy of one's home is diluted and additionally threatened. If indeed "the right of privacy" is "one of the unique

¹⁸Instances of administrative searches, including situations of cooperation of administrators and police, are presented in several sources: E.g., *State v. Pettiford*, 28 U.S. Law Week 2286 (Dec. 29, 1959) (see note 21, *infra*); *Parrish v. Board of Supervisors*, 242 A.C.A. 665 (1966); Reich, "Midnight Welfare Searches and the Social Security Act," 72 Yale L.J. 1374 (1963); Lassen, *The History and Development of the Fourth Amendment to the United States Constitution* 51 et seq. (1937); Comment, "State Health Inspections," 44 Minn.L.Rev. 513 (1960); Note, 25 Mo.L.Rev. 79 (1960).

values of our civilization"¹⁹ and the protection against governmental intrusion concerns "the very essence of constitutional liberty and security,"²⁰ then surely this protection reaches all phases of governmental intrusion into the home.

Furthermore, as the extent of administrative searches increases, their immunity from the search warrant requirements will increase the temptation of the police to rely on administrators to search in situations where otherwise a search warrant would be required. "... the administrative officer who invades the privacy of the home may be only a front for the police who are thus saved the nuisance of getting a warrant." *Abel v. United States*, 362 U.S. 217, 242, 4 L.ed.2d 668, 688 (1960) (Douglas, J., dissent). Indeed, this very thing did occur in Maryland where a police officer was assigned to the Sanitation Division to gain entrance to a home to determine if gambling were going on.²¹ It is this danger also which requires this Court to make clear that the administrative search also requires a warrant.

¹⁹*McDonald v. United States*, 335 U.S. 451, 453, 93 L.ed. 153, 157 (1948).

²⁰*Boyd v. United States*, 116 U.S. 616, 630, 29 L.ed. 746, 751 (1886).

²¹*State v. Pettiford*, cited in note 18, *Supra*, and discussed in the dissent of Justice Douglas in *Abel*, 362 U.S. at 242-43, 4 L.ed. 2d 688. Although in that particular case the subterfuge was discovered and sanctioned, this example shows the serious type of problem caused by the *Frank* case.

II

EVEN IF A SEARCH WARRANT IS NOT CONSTITUTIONALLY REQUIRED FOR AN ADMINISTRATIVE SEARCH, THE ORDINANCE IN THIS CASE IS INADEQUATE FOR FAILING TO REQUIRE PROBABLE CAUSE.

We do not believe that the significant issues of this case can be met without coming to grips with *Frank v. Maryland*. As important as the existence of probable cause may be to support a search, the requirement is only meaningful if there is an independent magistrate to apply this standard upon the basis of sworn oral or written testimony. If a statute merely has a requirement of probable cause, but leaves it up to the health inspector to determine this, then one of the major protections under the doctrine of probable cause—the independent determination of its existence—is lost. See *Johnson v. United States*, 333 U.S. 10, 13-14, 92 L.ed. 436, 440 (1948); *McDonald v. United States*, 335 U.S. 451, 455-56, 93 L.ed. 153, 158 (1948). Certainly in criminal cases, “absent some grave emergency,”²² searches without warrants “are held unlawful notwithstanding facts unquestionably showing probable cause.” *Agnello v. United States*, 269 U.S. 20, 23, 70 L.ed. 145, 149 (1925). We submit the constitutional protection should not be any less in searches in other cases.

However, if this Court does not wish to overrule *Frank v. Maryland*, the decision below should be reversed because it extends the right of inspection beyond that allowed in *Frank*. The ordinance in *Frank*

²²*McDonald v. United States*, 335 U.S. 451, 455, 93 L.ed. 153, 158 (1948).

contained a requirement of probable cause before a search could be made, and Justice Whittaker in providing the fifth vote for the result of the main opinion stated clearly that the ground for his concurrence was that the evidence showed that there was probable cause to justify a search.²³

In the instant case the applicable ordinance, section 503, does not contain a requirement that the inspector have probable cause before he demands the right to search the premises, and the highest State Court in this case approved this ordinance under such an interpretation.²⁴ Health inspectors in San Francisco, as long as they act "at reasonable times" and "in the performance of their duties,"²⁵ may demand entrance into the home even if they do not have any evidence of probable cause of a violation. On refusal, they may coerce entry by threat of criminal prosecution and obtain it as against the most determined resident by repeated convictions. Hence even the smallest protection for the resident has been eliminated.

Furthermore, on the facts of this case there was no probable cause to support a search of the premises. The investigation in this case was not to discover

²³See *Frank v. Maryland*, 359 U.S. 360, 373-74, 3 L.ed.2d 886 (1959) (Whittaker, J., concur.)

²⁴See the opinion of the District Court of Appeal in the instant case. R. 66, 67. See also the statement by the Deputy District Attorney before the trial court that "under the wording of this statute, there need be no suspicion" to serve as the basis for an inspection. R. 32.

²⁵S. F. Mun. H. Code sec. 503, R. 6. The duties of inspectors include seeking out possible violations. See, e.g., S. F. Housing Code sec. 501(b), R. 80.

some suspected but undetermined health hazard. Respondent's Answer filed in the trial Court shows that the investigation was at most to determine whether the ground floor of a particular apartment house was properly occupied.²⁶ The health inspectors believed it was zoned for commercial occupancy, not residential occupancy. Appellant admitted to the inspectors that he was residing in that portion of the building which they believed was zoned for commercial use only.²⁷ The insistence of the inspectors to search the premises was not for the purpose of determining whether there was an emergency hazard or even whether the law was being violated, but was only a gratuitous desire to rigorously assert their privilege under section 503.

Dictum in *Frank* has been relied upon to remove Fourth Amendment protection in cases in which the statute involved did not require probable cause. One such case was *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 4 L.ed.2d 1708 (1960), in which an equally divided decision of this Court affirmed the decision of the Ohio Supreme Court. The other decision was *St. Louis v. Evans*, 337 S.W.2d 948 (Mo. 1960). It should be noted, however, that in the *Evans* case the defendants were not occupants of the portion of the premises which the inspectors sought to enter.²⁸

²⁶R. 18-20.

²⁷See Answer to Petition for Writ of Prohibition (R. 19) and the opinion of the Court below (R. 61). See note 2, *supra*.

²⁸*Givner v. State*, 210 Md. 484, 124 A.2d 764 (1956), also upheld the claim of a health inspector to search without the necessity of a warrant. However, in that case the applicable ordinance had a requirement of probable cause.

Therefore, even if *Frank* is to remain, at least this ordinance may not.

III

WHETHER OR NOT THE FOURTH AND FOURTEENTH AMENDMENTS PROHIBIT WARRANTLESS ADMINISTRATIVE SEARCHES, THE RIGHT TO PRIVACY HAS BEEN VIOLATED IN THE CASE AT BAR.

The right to privacy as an independent constitutional doctrine binding on governments stands today as an unknown quantity; it lives in the Cartesian sense that it "is" (*Griswold v. Connecticut*, 381 U.S. 479); yet its substance and direction are not developed. It would be presumptuous of appellant to claim to know the limits or full content of the right to privacy, and yet it would not be wise to ignore a right which so obviously aids his case simply because the Court's decision might be placed on other grounds.

It is our belief that the right of privacy will keep its place as a necessary structural support for the life of freedom which is the product of the more specific guarantees of the Bill of Rights.²⁹ We do not detract from the wisdom of James Madison, Thomas Jefferson, John Adams and the other great American men

²⁹As Mr. Justice Douglas wrote in *Griswold v. Connecticut*, 381 U.S. 479, 482:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

of the Eighteenth Century if we say that they were not able to see our age of flashing, geometric advances in the field of science. Each increase in man's power over his environment is an increase in man's power over other men. For this reason, the right of privacy—"to be let alone"—ought to be extended to secure the privacy of one's home and effects whether or not there is a technical violation of the Fourth Amendment, absent a grave emergency or a judicial determination that there is adequate cause for the breach of this privacy.

The wire tapping case, *Olmstead v. United States*, 277 U.S. 438, 72 L.ed. 944 (1928), gave birth to the idea that the Fourth Amendment is a protection against certain methods of invasions of privacy—trespasses—rather than securing the right itself. This concept has produced hair-splitting decisions such as the "spike mike" case, *Silverman v. United States*, 365 U.S. 505, 5 L.ed.2d 734 (1961). We believe these cases evade the issue, which is the security of the individual in his home, and that the *Olmstead* case ought to be overruled not only for the reasons stated in its justly famous and often cited dissenting opinions, but for the reason that it is incompatible with the concepts of security and privacy recognized as of constitutional dimension in *Griswold v. Connecticut*. The rule of *Frank v. Maryland* is equally incompatible with *Griswold*, since the latter case states:

The Fourth and Fifth Amendments were described in *Boyd v. United States* . . . as protection against all governmental invasions "of the

sanctity of a man's home and the privacies of life". (381 U.S. at 484.)

See also the dissenting opinion of Mr. Justice Harlan in *Poe v. Ullman*, 367 U.S. 497, 550-551.

IV

CONCLUSION

Because the San Francisco ordinances before the Court violate the constitutional protection of security of the person in his home, it is respectfully submitted that the judgment of the Court below should be reversed.

Dated, San Francisco, California,
December 1, 1966.

Respectfully submitted,

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Office Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 92

ROLAND CAMARA, *Appellant*,

v.

MUNICIPAL COURT OF THE CITY AND COUNTY
OF SAN FRANCISCO, *Appellee*.

No. 180

NORMAN E. SEE, *Appellant*,

v.

CITY OF SEATTLE, *Appellee*.

APPEALS FROM THE DISTRICT COURT OF APPEALS OF THE STATE
OF CALIFORNIA, AND THE SUPREME COURT OF THE STATE OF
WASHINGTON.

**BRIEF AMICI CURIAE OF THE MEMBER MUNICI-
PALITIES OF THE NATIONAL INSTITUTE OF
MUNICIPAL LAW OFFICERS.**

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**BRIEF AMICI CURIAE OF THE MEMBER MUNICI-
PALITIES OF THE NATIONAL INSTITUTE OF
MUNICIPAL LAW OFFICERS.**

Interest of Amici Curiae

The National Institute of Municipal Law Officers (NIMLO) is an organization composed of more than thirteen hundred municipalities located in each of the fifty

states, the District of Columbia and Puerto Rico. Each member city acts through its chief legal officer, known variously as City Attorney, City Solicitor, Corporation Counsel, Director of Law, etc.

This brief is filed pursuant to rule 42(4) of this Court. The members of NIMLO are political subdivisions of states, and this brief is sponsored by their authorized law officers.

The issue presented in these cases is of vital interest not only to the Cities of Seattle and San Francisco but to all municipalities which seek to prevent health and fire hazards and exercise other necessary police power functions under ordinances providing for reasonable inspections of commercial buildings and private houses. The issue is also of vital interest to the millions of inhabitants of those municipalities whose life and health and property are protected by such inspections.

The members of NIMLO were represented by brief amici curiae and also in oral argument in the first case presenting to this Court the issue of the constitutionality of municipal housing inspection, *District of Columbia v. Little*, 339 U.S. 1 (constitutional issue not decided). They were also represented by brief amici curiae in *Frank v. Maryland*, 359 U.S. 360 and *Ohio ex rel Eaton v. Price*, 364 U.S. 263. It is because of the collective experience of the NIMLO municipalities with the necessity for reasonable inspection ordinances, and their awareness of the danger which is posed to the health, safety, and general welfare of their respective communities by these attempts to eliminate those ordinances, that this brief amici curiae is filed.

Summary of Argument

The rights guaranteed by the Constitution are not absolute. In the case of the right to privacy under the fourth amendment, only *unreasonable* searches are prohibited.

The same limitation, though not in specific terms, applies to the right to privacy under the fourteenth amendment. Whether a search is or is not unreasonable depends upon a balancing of all interests for and against allowing the search. In this case, the interest of all the people in guarding the public health and safety outweighs the interest of the individual householder in being free from the slight inconvenience caused by reasonable municipal inspection of commercial buildings and dwellings. Commercial building and housing inspections are not unreasonable searches (or seizures) within the meaning of the Fourth or Fourteenth Amendments.

ARGUMENT

I. Constitutional Prohibitions Apply Only to Searches Determined To Be "Unreasonable" After Consideration of All Interests and Facts.

The civil liberties guaranteed by the Constitution are not absolute. They are subject to reasonable limitations in the exercise of the police power of the state. *American Communications Ass'n. v. Douds*, 339 U.S. 382, 398-99. This Court has said:

"We have never held that such freedoms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excess of unrestrained abuses.'" *Id.* at 399.

Moreover, the guarantee of individual privacy by the Fourth Amendment is by its language specifically qualified. It is not an absolute prohibition of all searches of commercial buildings and houses. It prohibits only those which are "*unreasonable searches.*" (Emphasis added.)

The same limitation must be read into the due process of law clause of the Fourteenth Amendment. The determination of whether inspection of commercial buildings under the San Francisco and Seattle ordinances is an *unreasonable* search within the meaning of the Constitution will depend upon a balancing of interests between the right of an individual to privacy in his own home or commercial building and the duty of a municipality to guard the health and welfare of all its people through the exercise of its police power. It is to this balancing of interests that the Amici Curiae wish to direct their argument. Because of the collective experience of more than thirteen hundred NIMLO member cities all over the nation in fire prevention and sanitation, the Amici Curiae feel particularly qualified to bring to the attention of this Court the gravity and importance of the public interest in the preservation of reasonable inspection ordinances.

II. The Public Interest Requires Commercial and Housing Inspections

Commercial building and dwelling inspections cannot be made from a courthouse. It is not a question primarily of the inconvenience involved in procuring a warrant every time there is a complaint as to unsanitary or unsafe conditions. The fact is that the public cannot be protected merely by following up warrantable complaints. The major public health and safety programs in this country are grounded on the concept that it is through prevention of conditions which result in health and safety hazards, and not in the punishment of violators, that the public welfare is best protected.

A reversal of the decisions of the state courts in these cases would destroy the systems of preventive inspections now set up all over this country, and would make fire and

safety inspectors mere process servers for the purpose of abating conditions which have already grown to the stature of public menace. Effective health, fire and safety administration is not based upon complaints, but is the result of periodic scientific checks by trained inspectors to determine health, fire and safety conditions and recommend such corrective action as is needed to prevent or eliminate hazards and dangers. This fact is amply illustrated by the results of a test survey conducted by a grand jury in New York City convened to investigate hazardous and unsanitary conditions in housing. Surveyed by an inspection team were fifteen square blocks of housing in three respective areas of Brooklyn, in which 567 housing division violations had been previously reported on complaint. The inspection survey revealed an actual total of 12,445 violations in the test area, many of them classed as "hazardous." Moreover, other New York City inspections indicated that this ratio was not out of line. Grand Jury Presentment, "In the Matter of the Investigation of the Enforcement of Any and All Laws Concerning Hazardous and Unsanitary Conditions in Dwellings, etc.," Kings County Ct., N.Y., pt. 1, pp. 6-8 (January 28, 1953).

Only 567 violations on file prior to the test inspection as against 12,445 violations after the test! Can there be any doubt of the need for regular preventive inspections?

III. Illustrative City Experience Underscores the Health and Safety Needs Which Can Only Be Met by Routine Periodic Inspections.

Programs of preventive inspection similar to that conducted by San Francisco and Seattle have drastically reduced fire hazards in countless other cities in this country. These inspections have been part of a scientific plan to educate the householder into avoiding catastrophe rather than

confining municipal efforts to extinguishing fires after they have occurred.

History is replete with city-wide fires: London in 1666, New York City in 1835, Boston in 1872, Chicago in 1871, and Baltimore in 1904, and Seattle in 1889.

Destructive fires took a toll of 12,000 lives and nearly \$1.75 billion in property in 1965 in the United States according to a report by the National Fire Protection Association, "Fires and Fire Losses Classified—1965," Fire Journal, Vol. 60, No. 5, September 1966. The fire fatality total showed an increase of 100 over the previous year, and brought the figure close to the record mark of 12,100 fire deaths reported in 1954. One small note of encouragement in the report was a slight decline in fire deaths in homes. In 1965 approximately 6,500 persons were killed in home fires, compared with 6,550 in 1964. Almost one-third of all fire victims in the home—about 2,100—were children. The 1965 property loss total was \$1,741,300,000, a 5.4 per cent increase from the previous year, when fire cost \$1,652,700,000. 1965 was the sixth successive year in which the loss total has exceeded the \$1.5 billion mark. Among the principal factors in the increase in property losses was a sharp rise in the cost of fires in industrial plants, private dwellings, stores, hotels and churches. *Ibid.*

There is a great need for inspection in connection with garbage and rodent nests, two of the greatest sources of the spread of disease in this country. If the health officers of all the cities of the country are to wait for the complaints of neighbors and then issue warrants predicated upon the information received, the effective work that is being done in preventing epidemics in this country will henceforth be curbed. For every neighbor who complains, there are hundreds who are unwilling to become involved in a backyard fight to preserve the health of the community, others who

are phlegmatic to the danger, and still others who are joint offenders:

The Chicago Board of Health, from November, 1965 to December, 1966, conducted a massive program to eliminate rodent infestation in the city on a door to door, block by block basis, inspected 46,007 buildings of which 18,654 were found to be rodent infested. In addition to being rodent infested, 80% of the buildings inspected were found to be insect infested. The Chicago Fire Prevention Bureau, from January 1 to December 1, 1966, conducted scheduled or systematic inspections of 67,155 residential, 14,014 hotels, 51,360 industrial, 37,458 commercial, 12,548 schools, 2,843 hospitals and 6,623 day nurseries. And during the same period of time the Chicago Building Department made 47,461 inspections pursuant to complaints received, 37,168 inspections in conservation areas, and 22,713 buildings as prescribed by the City Code.

For the year 1965, the City of Cleveland Division of Housing effected 50,254 inspections and found 42,622 violations. The Cleveland Health Department made 55,913 inspections of commercial establishments and found 33,809 violations, and inspected 38,312 dwellings and found 27,553 violations. In addition the Cleveland Fire Prevention Bureau made 17,080 inspections and 7,422 reinspections, and found 14,892 violations.

The City of Boston Housing Inspection Department, during the period May, 1965 through September, 1966, inspected 48,806 dwellings, 20,056 buildings, found 56,338 violations, and made 44,484 reinspections. The Boston Redevelopment Agency also conducted 6,220 inspections during that period.

The Baltimore Bureau of Building Inspection made 13,408 inspections in 1965. As was shown in *Frank v. Maryland*, 359 U.S. 360, 372, fn.16, the Baltimore Health Department

had made 36,119 housing sanitation inspections in the year 1958.

The City of Los Angeles Conservation Bureau made a total of 129,574 inspections in 1965-66. And during that same period the Los Angeles Bureau of Fire Suppression inspected 76,527 dwellings, made an additional 183,596 general inspections, 7,962 vacant lot inspections and 5,333 unclassified inspections, during the course of which they found a total of 28,569 hazardous violations.

The City of Portland, Oregon conducted home surveys of 27,374 dwellings in 1966, and found a total of 4,514 violations of health and safety regulations. During 1965 the Portland Fire Marshall conducted 15,851 routine fire inspections, and 8,827 special inspections on complaints, and noted a total of 17,209 violations.

The City of Jacksonville, Florida, conducted 21,111 fire prevention inspections and reinspections of apartment buildings, business and industrial establishments in 1965, and during the same period the Jacksonville Health Department conducted a total of 135,330 inspections.

The City and County of San Francisco, whose ordinance is involved in the instant case, through its Health Department made inspections in 1965-66 as follows: Apartments 46,626, Hotels 8,105, Dwellings 8,251, for a total of 62,982. The San Francisco Public Works Department for the same period conducted 13,337 building permits inspections, 52,137 building inspections, 43,478 electrical inspections and 33,073 plumbing inspections. The San Francisco report advised that their inspectors have been refused entry to premises on less than ten occasions during the fiscal year 1965-66.

The City of Seattle conducted the following routine fire inspections of commercial and industrial buildings: 131,971 in 1962; 88,297 in 1963; 63,516 in 1964 and 85,220 in 1965.

These statistics bear out the fact that hundreds of thousands of inspections are made by cities each year without a warrant and are sanctioned by the overwhelming majority of the people.

Cities maintain these costly inspection programs because their people feel they are necessary for the protection of the general health, safety and welfare. The local governments of this nation spend billions of dollars each year on sanitation activities. It is not the zeal to render a public service that impels cities to maintain these costly sanitation programs. It is the recognition of the fact that the control of garbage is the primary step in the control of certain very serious diseases. For example, the danger of typhus, where the infection results from the bites of insects borne by rats, is tremendously increased where the garbage sanitation is not adequately controlled. The same danger exists where housing inspectors are not allowed to inspect dwellings or commercial buildings for rodent infestation and other health and safety hazards.

Possible health or safety hazards in Appellants' building are not Appellants' business alone. Fires ignited by safety hazards which might have been uncovered by municipal inspection spread to adjoining buildings and houses, and have been known to level entire city blocks. Rodents which breed in filth do not stay at home, nor do the disease germs which they spread. A man's home may be his castle, but that castle no longer sits on a hill surrounded by a moat. The modern "castle" is connected to a common water system, a common sewer system, a common garbage collection system, a common police, fire, health and welfare service, a common telephone service, a common gas line, a common electric line, common streets, alleys, sidewalks and drains, and are frequently connected by common walls to

the houses on either side. A man's home is his "castle," but cities through health and safety inspections are trying to keep it from becoming his "casket."

The case of the open garbage can may not be as intriguing to students of constitutional law as a case involving freedom of speech and assembly, but the assemblage of rodents and germs can have equally far reaching effect. A colony of rats is capable of increasing at the rate of six percent per day. One germ, after thirty divisions, becomes one billion germs—a formidable armed enemy. This is not fanciful, but realistic. To municipal officers, in constant touch with health and safety problems, it is impossible to shrug off the very real dangers that lurk in the everyday problems of sanitation. The practical administrative obstacles to operating inspection systems under laws which require warrants issued upon a showing of probable cause to suspect a violation of the building, housing, health or sanitary code before entering the house or building cannot be urged too strongly. It just cannot be reasonably done that way. Cause to suspect a violation would be present only in that portion of cases where complaints have been received or where a nuisance situation has reached the point where it can be seen or smelled from outside the building. Olfactory health control is no answer to the major health and safety problems of this country. The violations that smell represent too small a portion of the whole. By the time putrefaction sets in, very valuable time has been lost and an emergency phase has begun. The whole public health program is predicated upon the basic principle that improper practices must be corrected and abated *before* they reach the stage of glaring danger.

If building and housing inspection ordinances are invalidated, countless cases of defective building and household plumbing which inspections would discover will be

permitted to continue uncorrected. Defective plumbing may cause back siphonage of sewage and other household wastes into the public water supply. The amoebic dysentery epidemic in Chicago in 1933, resulting in 109 deaths in over 1,000 known cases, was caused by just such a situation. *Amoebic Dysentery in Chicago*, 24 Am. J. Pub. Health 756 (1934). Water is also a vehicle for the dreaded diseases of cholera and typhoid fever.

The invalidation of commercial building and housing inspection ordinances would prevent the effective checking of electrical work for fire hazards, or of hot air furnaces to determine whether proper combustion is achieved so as to prevent the escape of noxious gas. It is worth noting that about two years after the attempted inspection in *District of Columbia v. Little*, 339 U.S. 1, a fire gutted the home of the respondent and burned to death her two-year-old child. Washington Star, Aug. 6, 1949, p. A-20, col. 1; Aug. 7, 1949, p. A-7, col. 7. While the cause of the fire was reported as undetermined, the incident serves as a grim reminder of the kind of loss that can frequently be prevented by municipal inspection.

Field inspections also play a vital role in urban redevelopment and slum clearance. D. C. Department Licenses & Inspections Rep., "Housing Code Enforcement" (Dec. 24, 1958). Federal government statistics show that slums, which constitute only 20% of the total residential area of the average American city, produce 35% of all fires, 45% of major crimes, and 50% of disease. *Id.* at 23. In the important case of *Berman v. Parker*, 348 U.S. 26, 32, this Court recognized that:

"Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the

people who live there to the status of cattle. They may indeed make living an almost insufferable burden."

It is equally true and imperative that the Fourth Amendment should not be interpreted as constituting a bar which prevents the legislature from protecting the values pointed out so vividly in *Berman* at 348 U.S. 33 where this Court said:

"The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

To impede the routine, periodic, area-wide non-discriminatory "civil" inspection of buildings and dwellings to protect these concepts and values by the requirement of obtaining hundreds of thousands of warrants in a time and court consuming process can serve but one purpose, and that it to endanger the continued existence of our nations cities.

There is also grave doubt whether any of the present state constitutional and statutory provisions which authorize a court to issue warrants for specific kinds of searches and seizures, mostly in the criminal area, would permit the issuance of a warrant for health and safety inspections.

IV. The Need for Periodic Inspections Has Been Recognized Not Only by Cities But by the Congress in Its Efforts to Solve the "City Crisis".

The "city crisis" is largely encompassed within the slum areas of cities. Area-wide, planned inspections of buildings are a major part of the Federal-City Cooperative pro-

gram to deal with the elimination of substandard homes which are thus unfit for human habitation.

The Congress has adopted federal-aid programs and authorized grants and the expenditure of billions of dollars to cities to rehabilitate and improve the housing and living conditions in our cities. A total financial responsibility for more than \$78 billion was involved in the programs of the Department of Housing and Urban Development as of September 30, 1966. In order for a city to obtain federal-aid for slum clearance, urban renewal, and low-rent public housing, it must comply with the "Local Responsibilities" as set out in Sec. 101(a)(b) of Title 1, Housing Act of 1949, as amended, as follows:

"... That commencing three years after the date of enactment of the Housing Act of 1964,* no workable program shall be certified or re-certified unless (A) the locality has had in effect, for at least six months prior to such certification or re-certification, a minimum standards housing code, related but not limited to health, sanitation, and occupancy requirements, which is deemed adequate by the Administrator, and (B) the Administrator is satisfied that the locality is carrying out an effective program of enforcement to achieve compliance with such housing code..."

Under authority of this Act, the Administrator published a "Workable Program for Community Improvement, Answers on Codes and Ordinances, Program Guide 1," which sets out the following specific requirements with which a city must comply in order to be eligible for federal-aid:

"... a codes review committee or similar group to review codes and code enforcement technically and objectively.

* September 2, 1964 (footnote added).

"... the adoption of modern building, plumbing, electrical, housing and fire prevention codes during the first year after initial certification.

"... effective enforcement of codes following adoption and planned systematic housing code compliance program to be started within one year after the adoption of the housing code.

"... accurate reporting on compliance activity and a showing that there is a reasonable use of appropriate local resources in terms of inspectors and funds needed to enforce compliance with the codes."

The importance of code enforcement is also shown by the fact that the Federal Government through the Department of Housing and Urban Development has a specific program of federal assistance to local government to stimulate such enforcement.

It is submitted that the added burden of obtaining a Fourth Amendment warrant for each inspection under the requirements of Federal Laws would greatly impede the programs which the Federal Government and cities have instituted to alleviate the persistence of wide-spread slums and blight which have resulted in a marked deterioration in the quality of the environment and the lives of large numbers of people throughout the nation.

V. Interest of Individual Commercial Property Owner and Householder in Absolute Privacy

The *reasonableness* of the search involved in these cases depends upon a balancing of interests. It has been shown that the interest of the people—acting through their agents, municipalities—in exercising police power through health and safety inspections is indeed great. What are the interests of the individual owner in maintaining an absolute

right of privacy in his commercial building or home against such inspections.

It should be noted initially that the overwhelming majority of building and home owners feel their interests lie in permitting such inspections, and welcome the periodic visits of municipal inspectors which they know can uncover hazards the correction of which may save their lives by stopping fire or disease. Yet what of owners who, like Appellants, feel differently? What are the dangers to such property owners if inspection is allowed?

Unlike the householders in all cases in this Court where searches have been declared unconstitutional, these appellants are subject to no criminal prosecution. The inspecting official is not looking for evidence of a crime. Under the Seattle and San Francisco ordinances, as under most inspection ordinances, if a health or safety hazard is found the owner is merely notified to correct it and a penalty attaches only if he fails to comply. The result of the inspection is not that a defendant is convicted of a crime because of discovered evidence, but that an unsafe condition in his building or home is corrected. This Court has correctly held that properly circumscribed inspections without warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, are valid. *Frank v. Maryland*, 359 U.S. 360.

But what of the nuisance to the householder caused by inspections? There is no contention in the instant cases that the owners were harassed by repeated inspections, nor that the inspections in question were to be made at an inconvenient time of the day. Indeed, the San Francisco ordinance under attack requires that the inspection be made at a reasonable time, and the particular inspection involved was attempted to be made during a reasonable hour. No facts on the time of the attempted Seattle inspection are

given. There is no contention in the instant cases that the inspectors had any motive other than the discovery of a possible health, fire or safety hazard. This is not the case of the knock on the door in the middle of the night, or even of interference with the family dinner hour. The rule of reasonableness which has been developed in cases passing upon due process of law (and which is specifically incorporated in the language of the Fourth Amendment forbidding only *unreasonable* searches) is always a protection against the capricious action of government officials. It cannot be doubted that abuses of the health and safety inspection ordinances could be remedied if they should transpire.

VI. Balancing of the Interests of Public Need and Individual Privacy

When the interests are balanced, then, the scales are grossly uneven. In order to preserve the nebulous private right of the Appellants and a few others like them, this Court is asked to jeopardize the lives and health of millions of city residents the nation over. One death from fire or disease originating in a filth strewn cellar should be sufficient to tip the scales but in fact thousands of such deaths are a realistic possibility.

The fundamental purpose of the Fourth Amendment was certainly to secure privacy in the home, and the due process of law clause of the Fourteenth Amendment also protects the right of privacy. But it must be remembered that under the police power there is lawful interference in many instances with the liberty of individuals, their right to move around and their right to use their property. Individual freedom must yield in some cases to the enforcement of reasonable regulations for the public welfare. The individual's right of privacy in his home should not give him the

right to refuse entry for a reasonable fire or health inspection any more than the right of free speech gives the right falsely to shout "fire" in a theater, *Schenck v. United States*, 249 U.S. 47, 52, or the right of freedom of religion gives the right to offer human sacrifice, *Reynolds v. United States*, 98 U.S. 145, 166.

Where public health and safety is at stake, this Court has sanctioned, as against constitutional objection based on individual rights, the power of the government summarily to enter premises and seize and destroy putrid food, *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, and the power to provide for compulsory vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11. Indeed, it has already recognized what the Amici Curiae urge upon it now:

"Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of safeguards necessary for a search of evidence of criminal acts." *Frank v. Maryland*, 359 U.S. 360, 372.

VII. One Rebel a Year

The dissent in *Frank v. Maryland*, 359 U.S. 360, 384, suggests that "Submission by the overwhelming majority of the populace indicates there is no peril to the health program." The Amici Curiae are unwilling to accept a theory which makes the preservation of public health and safety dependent upon consistent submission by citizens to an invasion of their constitutional rights. If we believed housing inspections to be unconstitutional, we would encourage citizens to resist!

It is true that most housing occupants now welcome the

periodic visits of municipal inspectors. But there are others who, while realizing the value of housing inspection, are more concerned at the moment the inspector knocks on their door with the immediate prospects of having to spend time and money to correct possible defects.

The experience of the City of Portland, Oregon, with a program of voluntary home inspection indicates what can happen where entry is by consent. The records of the city for the year 1966 show that out of 16,171 calls made where occupants were at home, entry was refused in 2,540 cases. In the inspections which were made, 4,514 hazardous conditions were noted and called to the attention of the occupants.

"One rebel a year," says the *Frank* dissent, is not too great a price to pay for the right of privacy. The *Amici Curiae* submit that the human suffering and loss of life from fire and disease which can result from the undetected code violation of even one rebel a year are too great a price to pay for the type of privacy which Appellants seek. That there may be a significant increase in the number of refusals of entry if this Court declares housing inspection of the kind here involved unconstitutional is a reasonable, and frightening, possibility.

Conclusion

It is worth noting that in over 150 years of city *in rem* inspections for health and safety purposes, only one appellate court has held that a Fourth Amendment warrant is required and it was affirmed on appeal to this Court for other reasons without reaching the constitutional issue. *District of Columbia v. Little*, 339 U.S. 1. It is also noteworthy that not one of the five highest state courts to pass on this question since this Court's landmark decision in *Frank v. Maryland*, 359 U.S. 360, have found fault with the rule that reasonable inspections are constitutionally imperative for the protection of the health safety and welfare of the millions of inhabitants of cities. *M. DePass v. City of Spartanburg*, 107 S.E. 2d 350 (S.C. 1959); *St. Louis v. Evans*, 337 S.W. 2d 948 (Mo. 1960); *Camara v. Municipal Court*, 237 Cal., App. 2d 128, 46 Cal. Repr. 585 (1965); *Commonwealth v. Hadley*, 1359 Mass. Adv. Sheets 1966, decided by the highest court of Massachusetts on December 2, 1966; and *Seattle v. See*, 67 Wash. 2d 465, 408 P2d 262 (1966).

This brief is not submitted with a desire to weaken the individual rights guaranteed to all of us by the Constitution, but in an attempt to put those rights in a proper perspective. It is earnestly submitted that it was never the intended purpose of the Fourth and Fourteenth Amendments to prevent reasonable building and housing inspections to protect the public health and safety, and they should not be expanded to that point. It has been the vigilance of public health and safety inspectors and their well-integrated programs that have saved this country from some of the epidemics, scourges and conflagrations that would otherwise inevitably have occurred. To confine inspections to instances where there is reason to suspect a hazardous condition from outside the commercial building or house would

be to cause the preventive health and safety programs based upon periodic scientific checks to grind to a halt in cities throughout the nation. The decisions of the Courts below should be affirmed.

Respectfully submitted,

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No. 92

ROLAND CAMARA,

Appellant,

VS.

MUNICIPAL COURT OF THE CITY AND COUNTY
OF SAN FRANCISCO,

Appellee,

STATE OF CALIFORNIA,

Real Party in Interest.

On Appeal from the Judgment of the District Court of Appeal,
State of California, First Appellate District

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1966

No. 92

ROLAND CAMARA,

Appellant,

vs.

MUNICIPAL COURT OF THE CITY AND COUNTY
OF SAN FRANCISCO;

Appellee,

STATE OF CALIFORNIA,

Real Party in Interest.

On Appeal from the Judgment of the District Court of Appeal,
State of California, First Appellate District

BRIEF FOR APPELLEE

QUESTION PRESENTED

Whether the Fourth and Fourteenth Amendments make unconstitutional the sections of the San Francisco Municipal Housing Code providing that authorized employees under certain conditions may enter

any premises to carry out the health and safety inspections authorized by the Municipal Code, and that failure to permit such entry is a misdemeanor.

STATEMENT OF THE CASE

Appellant is the lessee of a portion of the ground floor of a three-story apartment building located at 225 Jones Street. Under the permit of occupancy issued by the San Francisco Department of Public Health, the entire ground floor of the building is restricted to commercial use. The permit also authorizes sixteen apartment units—eight on each of the second and third floors (R 18).¹

Section 86 of Part III of the San Francisco Municipal Code requires that the Division of Housing Inspection of the Department of Public Health make an inspection, at least once a year, of all San Francisco apartment houses for the purpose of issuing such permits of occupancy (R 36-37).

On November 6, 1963, Inspector Nall went to the premises at 225 Jones Street to make this required inspection. Upon arrival, he was informed by the manager that the lessee of the store on the ground floor was living in the rear of the store. Inspector

¹Appellant alleged in his Petition for Writ of Prohibition that he resided in one of the sixteen apartments in the building (R 1). During the Superior Court hearing on the writ, he made an offer of proof to show that the original plans for the building provided for both a store and an apartment on the first floor (R 48). The occupancy permit had, since 1924, restricted the ground floor to commercial use (R 49).

Nall questioned appellant about his occupancy of the rear of the store and was informed by appellant that he did in fact live on the premises. Inspector Nall requested permission to enter, but appellant refused (R 2, 19).

Inspector Nall returned to the premises on November 8, 1963, and again requested permission to enter and inspect. Appellant again refused. Subsequently, a citation was mailed to appellant to appear in the District Attorney's Office on November 22 to show cause why a warrant should not be issued for his arrest for violation of Section 507 of the Housing Code (R 19-20). Appellant did not appear at the scheduled hearing (R 20).

That afternoon, Inspector Nall, with Inspector Reid, again returned to Jones Street and requested permission to enter. Inspector Reid informed appellant that it was the legal responsibility of the Health Department to make an annual inspection of every apartment house in San Francisco, that the existing permit did not provide for an apartment on the ground floor, and that it was illegal for him to occupy the premises as a residence. Appellant again refused permission to enter (R. 20).

Appellant was subsequently arrested and charged with a violation of section 507 of the Municipal Housing Code for resisting the execution of section 503 of the Municipal Housing Code (R 2-3, 5-6).

A demurrer to the complaint was filed in Municipal Court on the grounds that section 503 was unconstitutional (R 7-8). Following that Court's ruling against

him, appellant applied for a writ of prohibition in the Superior Court on the same grounds (R 1-16). The Superior Court denied the writ, ruling that section 503 was constitutional (R 27). This ruling was affirmed on appeal to the District Court of Appeal (R 60-71), and a petition for hearing before the Supreme Court of California was denied on November 16, 1965 (R 72). This appeal followed.

Section 503 of the San Francisco Municipal Housing Code provides:

"Right to enter building. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

Section 507 of this Code provides for a fine of not more than \$500.00 or for imprisonment not exceeding six months, or both, for any person who resists or opposes the execution of section 503.²

There is no provision in the San Francisco Code permitting forced entry by the inspector in this situation, nor is there any provision under which a "search warrant" could be obtained.³

²The full text of section 507 is set forth in the Record (R 83).

³Additionally there would be no grounds for issuance of such a warrant under state law. See Cal.Pen.Code § 1524 (App. 1). It should be noted that the California State Housing law, Cal. Health and Saf. Code §§ 17910-17995, contains a similar right of entry provision. See Cal. Health & Saf. Code § 17970 (App. 1-2). The state law also provides that no entry can be made between 6:00 p.m. and 8:00 a.m. without the consent of the owner or occu-

SUMMARY OF ARGUMENT

At issue in this case is the right of a local community to enact ordinances requiring the occupant of a residence to submit to a routine, duly authorized health inspection, without a warrant, conducted with due regard to his convenience. In *Frank v. Maryland*, 359 U.S. 360 (1959), and *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960), this Court held that such inspections were proper. We submit that these cases were properly decided.

Periodic health and safety inspections, without the necessity of showing probable cause related to an individual residence, are essential for the safety and security of all those living in cities. An individual living in an apartment has no protection from hazardous conditions in an adjoining apartment except through a system of preventive inspections. Vigorous housing and building code enforcement is also essential to prevent the spreading blight of our cities, widely recognized as one of our most urgent problems. Such code enforcement has been encouraged and carried out through the federal government's urban renewal programs, designed to aid local communities in conserving and rehabilitating the local housing supply. These programs would be effectively destroyed without the power to inspect.

pants, nor any entry in the absence of the occupant without a court order. Cal. Health & Saf. Code § 17972 (App. 2). Section 17983 provides that the Superior Court may make any order for which application is made pursuant to these sections (App. 2). Thus, there is a limited "search warrant" provision. Since San Francisco has enacted its own Housing Code, however, the provisions of the state law are not applicable. See Cal. Health & Saf. Code § 19825 (App. 2-3).

It was this essential power to inspect which was approved in *Frank* and *Eaton*. The reasoning of *Frank* is consistent with the Fourth Amendment in considering the needs of society as well as the individual's general right to be protected from unreasonable searches. The Fourth Amendment does not prohibit reasonable searches and the decisions of this Court interpreting the Fourth Amendment require that all facts and circumstances be considered in deciding whether a search is reasonable. Consideration of the facts and circumstances of a health inspection fully justifies the holdings in *Frank* and *Eaton* that health inspections without warrants but with appropriate safeguards are constitutional. A health inspection is totally different from a search for criminal evidence both in quality and in result, and is reasonably subject to a different standard. The imposition of a search warrant requirement would provide no greater protection against inspection and might even give less protection to privacy. We submit that the system established for making health inspections reaches an appropriate balance between individual rights and public security.

No reason has been advanced to justify changing the rule of *Frank* except the principle of privacy. Cases explaining the impetus behind and interpreting the Fourth Amendment recognize that the individual's right to privacy is subject to the public welfare. Moreover, there is a widespread consensus among state Courts and legislatures that such inspections are proper. These determinations, while not binding on this court, should be persuasive authority.

The circumstances of the routine inspection at issue here present even stronger reasons for finding that the right asserted is reasonable. The San Francisco ordinance is carefully circumscribed, and does not authorize arbitrary inspections. The sole purpose of the ordinance is to protect the health and safety of the residents of the city. The imposition of a search warrant requirement would serve no useful purpose where such a routine inspection is involved because there is no judicial function to be performed. Such a requirement, however, could make it impossible to carry on the programs attempting to safeguard and upgrade the lives of those confined by economics to the blighted areas of the city and would create both confusion and an intolerable burden on the Courts without achieving any more protection of the right to privacy than now exists.

ARGUMENT

THE FOURTH AND FOURTEENTH AMENDMENTS DO NOT MAKE UNCONSTITUTIONAL THE IMPOSITION OF A PENALTY FOR REFUSAL TO PERMIT THE HEALTH AND SAFETY INSPECTIONS AUTHORIZED BY THE SAN FRANCISCO CODE.

In *Frank v. Maryland*, 359 U.S. 360 (1959), this Court upheld the constitutionality of an ordinance similar to the San Francisco ordinance but with the additional requirement that the inspector have cause to suspect that a nuisance exists. Shortly after the decision in *Frank*, this Court had before it a case involving an ordinance nearly identical to the San Fran-

cisco ordinance. The state Court decision holding the ordinance valid was affirmed by an equally divided Court. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960).⁴

Appellant, however, contends that the imposition of a penalty for refusing to permit a health and safety inspection without a warrant violates the Fourth Amendment because there is neither an emergency nor a lawful arrest (AOB 10). He would thus attempt to impose a fixed formula on the concept of Fourth Amendment reasonableness, and overrule entirely the carefully considered opinion of this Court in *Frank v. Maryland*, *supra*, which found such an ordinance reasonable after giving full consideration not only to the interest of society in the preservation of health and safety but to the right of the individual to privacy.

Appellant further contends that even if *Frank* remains, this ordinance must fail because it does not require probable cause. He supports this argument by asserting that "Justice Whittaker in providing the fifth vote for the result [in *Frank*] stated clearly that the ground for his concurrence was that the evidence showed that there was probable cause to justify a search." (AOB 26).⁵ Appellant not only misreads this

⁴Mr. Justice Stewart, one of the *Frank* majority, took no part in the case.

⁵Justice Whittaker's concurrence was clearly based on his understanding that the core of the Fourth Amendment prohibiting unreasonable searches applies to the states, that the Court's opinion adhered fully to that principle, and that the inspection approved was not an unreasonable search. See *Frank v. Maryland*, *supra*, at 373-74 (concurring opinion).

concurrence but overlooks the fact that Justice Whitaker was one of four Justices voting against noting jurisdiction in *Eaton*, where the ordinance required no probable cause, because *Frank* was considered controlling. See *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 248 (1959).

Finally, appellant apparently argues that the inspections provided for in the San Francisco ordinance are unconstitutional *even if a warrant were provided for* because no individual probable cause is required. See AOB 21-22.

In support of these arguments, appellant cites the history of the amendment and the decisions of this Court which apply the test of reason to the problems of search in areas other than health inspections.

Consideration of the history of the Fourth Amendment and the intent of the framers with regard to forfeitures and the use of general warrants to suppress free expression, to forfeit goods, or to search for and seize criminal evidence are hardly relevant in determining the reasonableness of health inspections. Consideration must be given to the interests of both society and the individual in reaching such a determination and here the history of the Fourth Amendment and the decisions of this Court support the approach of reason used in *Frank*.

We submit that *Frank v. Maryland*, *supra*, was properly decided and that its principle should be reaffirmed in the instant case. Health inspections cannot be analogized to searches for criminal evidence and reason does not require that our cities be strangled

in a constitutional straitjacket denominated an absolute right to privacy.

A. Health And Safety Inspections Conducted As Part Of A Planned Program, Periodically For Designated Facilities, Or By Designated Area, Are Essential To Protect Those Living In Cities And To Prevent The Decay Of The City Itself."

The health and safety inspection at issue in this case was undertaken pursuant to the specific provision of a municipal ordinance which requires that an inspection of all apartment buildings be made annually without any further showing of cause related to any individual apartment. Appellant raises the question of whether such inspections can constitutionally be made without a showing of individually related cause despite the clear implication in both majority and minority opinions in *Frank* that such inspections are proper. The *Frank* majority states,

"Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area by area search, or as here, to treat a specific problem, is of indispensable importance to the maintenance of community health. . . ." 359 U.S. at 372.

In writing for the dissenters in *Frank*, Justice Douglas noted:

"Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions inimical to the public health are being maintained. . . ." 359 U.S. at 383.

Experience has indeed shown the need for such periodic and area inspections.

Possible health and safety hazards in a city apartment or other dwelling are not the occupant's business alone as they might be in an isolated country home. A fire started through the improper use or installation of heaters or appliances could spread through an entire apartment building or city block, destroying both lives and property. An inspection of the entire premises under reasonable conditions is a minor infringement of the right of privacy but is a major safeguard of the right of all the tenants to be reasonably secure against conditions over which they have no control. Even if it can be argued that a person has the right to endanger his own life by living in dangerous or substandard conditions it cannot be said that he has the same right with regard to his neighbor. The individual's only protection against safety hazards in adjoining apartments or buildings is the assurance that an adequate program of preventive inspections is taking place. Hazards are particularly likely to occur in areas not specifically designed or approved for the use currently being made of them since unauthorized and uninspected heating, cooking, or sanitation installations may well have been made.

The compelling reason why health and safety inspections cannot depend on complaints or a showing of probable cause is seen clearly in the report of a test survey conducted by a grand jury in New York City in 1953. The grand jury was convened to investigate hazardous, unsanitary conditions in housing, and fifteen square blocks of housing in three representative areas of Brooklyn were surveyed. Prior to the survey,

567 housing division violations had been reported by complaint. The inspection survey revealed an actual total of 12,445 violations in the test area, many of them classified as "hazardous." Grand Jury Presentment, "In the Matter of the Investigation of the Enforcement of any and all Laws Concerning Hazardous and Unsanitary Conditions in Dwellings, etc." Kings County Court, New York, Part 1, pages 6-8 (January 28, 1953); cited in Brief of the Member Municipalities of the National Institute of Municipal Law Officers as *Amici Curiae*, p. 5, *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960). Thus, this survey disclosed twenty-two health and safety violations for every one violation for which there was a complaint. More persuasive evidence of the great need for a sound health and safety preventive program based upon periodic or area-by-area inspections could hardly be found.

There is widespread agreement that the plight of our cities is one of the most urgent problems facing contemporary society.

"Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost intolerable burden." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

In 1960, in addressing the first Governor's Conference on Housing in California, the Governor stated:

"[S]preading blight threatens to destroy large parts of our cities as desirable places in which to live and work and raise a family. The mounting

social costs in terms of crime, delinquency and disease are notorious."⁶

These problems have been the subject of extended comment by both planners and lawyers among whom there is general agreement that the establishment of housing and building codes and their vigorous enforcement is essential to any program attempting to alleviate the problems of the city.⁷ In 1960, this consensus was expressed as follows:

"[T]he police power embodying the enactment or improvement and the sound administration and effective enforcement of adequate local codes, is crucial to the successful long-term accomplishment of planned rehabilitation.

* * *

"Without question, the failure to enact, improve, soundly administer, and effectively enforce adequate local codes, more than any other single cause, accounts for the huge tasks of the present urban renewal effort. The broad concepts of urban renewal, their evolution and objectives, and the attending costs forcefully attest the serious con-

⁶Proceedings of the Governor's Conference on Housing, State of California, Department of Industrial Relations at 16 (1960).

⁷See, e.g. *Urban Renewal: Part I*, 25 Law & Contemp. Prob. 631 (1960); *Urban Renewal: Part II*, 26 Law & Contemp. Prob. 1 (1961); Gribetz & Grad, *Housing Code Enforcement, Sanctions and Remedies*, 66 Colum.L.Rev. 1254 (1966); Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 Cal.L.Rev. 304 (1965); Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 Harv.L.Rev. 504 (1959); Note, *Enforcement of Municipal Housing Codes*, 78 Harv. L.Rev. 801 (1965); Comment, *Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply*, 31 U.Chi.L.Rev. 180 (1963).

sequences of the neglect and default in this most important area of public action.

* * *

"[T]o do the entire job, new ways and means must be developed to assure a practical and sustained process of planned rehabilitation on a community-wide basis—at the heart of which must be adequate local codes soundly administered, and effectively enforced." Osgood and Zwerner, *Rehabilitation and Conservation*, 25 Law & Contemp. Prob. 705, 718-20 (1960).

Programs of code enforcement have not been a panacea, and even with them the problems of the cities remain acute. Without them, however, and with resort only to a program of responding to complaints, corrective measures could be taken only when the battle was lost and as a stop-gap before an area must be leveled, rebuilt, and the process permitted to begin again.

"[I]t is in the nature of the fight against deterioration and decay that enforcement must be continuous and sustained lest the ground gained earlier be lost." Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 Colum. L.Rev. 1254, 1257 n. 7 (1966).

In outlining the scope of the problem in New York, it has been pointed out that

"some 338,900 existing living units in the City of New York housing almost 1,000,000 people are contained in 43,000 old law tenements built prior to the effective date of the Tenement House Act of 1901." *Id.* at 1258 n. 13. ◊

* * *

"The city's aging housing inventory presents a broad spectrum of conditions from good upkeep to unbelievable deterioration. Buildings, even relatively good buildings, are likely to have numerous minor violations rather than the gross and evident sanitary violations of an earlier age. . . .

"[The] task is to deal with masses of minor violations that, though insignificant in themselves, amount in the aggregate to major deprivations of health and comfort to the residents." *Id.* at 1268.

California fortunately lacks, in contrast with large eastern cities, the high density central slum districts provided by speculative builders to house European immigrants in the late nineteenth century. Although the problems in California are different, they are no less severe. Even by the relatively crude index used to compile census data, there are 700,000 substandard dwellings in the state. To a disproportionate extent, they are occupied by people who have special disadvantages along with relative poverty. See Appendix to the Report on Housing in California, Governor's Advisory Commission on Housing Problems 39 (1963). California also faces the enormous problem of not only preventing the further deterioration of the present housing supply, but of providing housing for an estimated population growth of over five million in the decade 1960 to 1970. *Id.* at 260-61.

The federal government's response to these persistent, complex and perhaps ultimately unsolvable problems, has been increasing steadily since its first large-scale involvement with the enactment of the

Housing Acts of 1937 and 1949.⁸ These acts, however, authorized federal financial aid only for projects, involving complete demolition and clearance of slum areas and were ineffectual in preventing blight. They were also criticized for being of little value in meeting the need for low and low-middle housing, and for destroying established neighborhood values. See generally, Cunningham, *Land-Use Control—The State and Local Problems*, 50 Iowa L. Rev. 367, 454-57 (1965).

The first approach to a comprehensive urban renewal program came in 1954 with the amendment of the Housing Act⁹ to provide federal assistance not only for slum clearance but for programs consisting wholly or in part of the rehabilitation and conservation of existing areas through building and housing code enforcement. This program has been expanded and revised since 1954¹⁰ but the basic concept of a comprehensive program remains.

As the heart of the program, the act requires, as a prerequisite for federal funds, the establishment of a "workable program . . . to eliminate and prevent the development or spread of, slums and urban blight." 42 U.S.C. § 1451(c) (Supp. I, 1965). One of the elements of a "workable program" is the enactment of building and housing codes which state the minimum structural, safety, maintenance and

⁸50 Stat. 888 (1937); 63 Stat. 413 (1949).

⁹68 Stat. 590 (1954).

¹⁰The act is codified in 42 U.S.C. §§ 1441-86 (1964). The last amendment of the act was made in 1966 in the Demonstration Cities and Metropolitan Development Act of 1966. Public Law 89-754, 80 Stat. 1255 (1966).

health standards both for existing and new housing. See Guandalo, *Housing Codes in Urban Renewal*, 25 Geo. Wash. L. Rev. 1, 10-11 (1956).¹¹ The 1964 Housing Act amendments direct that, beginning in 1967, a workable program cannot be certified unless the locality has had in effect a housing code for at least six months and is carrying out an effective program of enforcement.

It was under the incentive of this federal program that San Francisco in 1958 enacted the comprehensive housing code of which the sections at issue in this case are a part. For similar reasons, not only San Francisco but cities throughout the nation have enacted or revised housing and building codes to obtain federal aid in attacking these pressing problems.¹²

These are the kinds of programs which would be destroyed if the power to make routine inspections is

¹¹Appellant makes no claim that the city cannot, under the police power, require conformance to minimum housing and building codes enacted in the public interest. Such laws have been repeatedly upheld. See, e.g., *Queenside Hills Co. v. Saxl*, 328 U.S. 80 (1946); cf. *Berman v. Parker*, 348 U.S. 26 (1954); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Appellant attacks, rather, the only means of enforcing such laws, inspection of the premises involved. It is an interesting historical note that the property rights subordinated to the public interest in the above cases were once considered "absolute" and inviolate: "So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; not even for the general good of the whole community." Blackstone's Commentaries 26 (Elwell, ed. 1889), cited in Guandalo, *supra*, at 14-15.

¹²Prior to 1954 there had been 56 housing codes enacted throughout the country. As a result of the workable program requirement, more than 1,000 communities have enacted housing codes since 1954. *Gribetz & Grad*, *supra*, at 1260 n. 19.

deemed to violate due process or the Fourth Amendment. These programs, developed to meet desperate and persistent problems, are hardly "arbitrary" invasions of privacy. The invocation of the Fourth Amendment would preserve "absolute privacy" for one individual but would remove the protection and security of this vital exercise of the police power from every other individual.

The Fourth and Fourteenth Amendments to the Constitution prohibit not all searches but only those which are unreasonable. *Carroll v. United States*, 267 U.S. 132 (1925). The Constitution does not define what are unreasonable searches and no "ready litmus paper" test nor fixed formula can be applied in this determination. *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950). Reasonableness must be determined in each case in the light of its own facts and circumstances. *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

The facts and circumstances in cases involving health inspections are totally different from those of searches and seizures of evidence to be used in criminal trials. The overriding public interest in making the health inspections at issue in *Frank v. Maryland* and the instant case, when balanced against the minimal interference with the individual's right to privacy, fully justifies the holding of *Frank* that such inspections without a warrant are reasonable under the Fourth and Fourteenth Amendments. These considerations present an even stronger case for reasonableness in the circumstances of the instant case.

B. Frank v. Maryland, In Applying A Test Of Reason To The Facts And Circumstances Involved In A Health Inspection, Reached A Result Entirely Consistent With The Fourth Amendment And Should Be Reaffirmed.

Appellant attacks the decision of this Court in *Frank v. Maryland*, *supra*, by asserting that the majority opinion in *Frank* held that the protection of the Fourth Amendment was limited to searches for the purpose of obtaining criminal evidence. In fact, *Frank* held that although the Fourth Amendment was not restricted to searches for evidence in criminal cases, a health inspection without a warrant but with adequate safeguards was not an unreasonable search.¹³

1. The Frank court recognized the general applicability of the Fourth Amendment in holding that a health inspection was constitutional.

The majority opinion reviews the historic background of the Fourth Amendment and states that,

"[T]wo protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection is self-protection; the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used

¹³Mr. Justice Frankfurter's opinion does not make it clear whether the balancing test employed was one of due process or one of Fourth Amendment reasonableness. Compare *Harris v. United States*, 331 U.S. 145, 162 (1947) (dissenting opinion). The concurring opinion of Mr. Justice Whittaker, however, makes it clear that the result was reached under the Fourth Amendment.

to effect a further deprivation of life or liberty or property." 359 U.S. at 365.

The Court notes that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions that the great battle for fundamental liberty was fought. The opinion continues,

"While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogues in state constitutions, the application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are *of course not restricted within these historic bounds.*" *Id.* at 365-66. (Emphasis added.)

Thus, whether or not the Court "misread" the "historic bounds" of the Fourth Amendment, the opinion recognizes a general right to be secure from unreasonable official intrusion into personal privacy. The Court holds only that this right of privacy is subject to the public welfare in the circumstances before it.

The majority opinion considers the liberty which was asserted:

"The absolute right to refuse consent for an inspection designed and pursued solely for the protection of the community's health, even when the inspection is conducted with due regard for every convenience of time and place." 359 U.S. at 366.

It also considers the safeguards of the ordinance and concludes that the inspection touched "at most upon the periphery of the important interests safeguarded

by the Fourteenth Amendment's protection against official intrusion . . ." 359 U.S. at 367.

The Court then states the crucial factor to be considered: that the demand made on the individual by the inspector "must be assessed in the light of the needs which have produced it." *Ibid.* Balancing these needs, and the long history of the use of such inspections, the Court concludes that the Maryland statute is constitutional. The question in both *Frank* and the instant case is not whether the individual is protected from unreasonable and arbitrary searches whether for criminal evidence or otherwise. Certainly he is. The question is whether an asserted right to make a health inspection without a warrant is reasonable, and it was this question that *Frank* decided in the affirmative.

2. Application of the *Rabinowitz* holding that all circumstances are relevant in determining reasonableness supports both the process and the result in *Frank*.

The view of the Fourth Amendment articulated by this Court in *United States v. Rabinowitz, supra*, requires that all the facts and circumstances of an individual case be considered in determining whether or not a search is reasonable. The balancing process used by the *Frank* Court was in effect an application of this concept in a situation where the rules dealing with criminal searches were not really relevant in resolving the complex problems involved. This approach, that there is no fixed formula to determine reasonableness, found expression in *Frank* as the Court considered both the community needs prompting the inspection

and the seriousness of the invasion of privacy involved.¹⁴

There can be little question of the compelling community need which led to the adoption of housing and building codes and methods to enforce them. An examination of the extent to which the privacy of the individual is invaded, however, shows that a search warrant would serve, not to give any more protection from inspection, but, perhaps, to give less practical protection to privacy.

The health inspection is not directed against the individual nor necessarily even related to something he may have done or failed to do. No loss of liberty results, whatever condition is found. The sole purpose of the inspection is to find and correct a condition which creates a danger not only for the occupant but for others equally entitled to security in their homes. In the usual case, if the condition is not corrected, and depending on its seriousness or extent, the building is condemned, abatement proceedings initiated, or the condition repaired by public authorities.¹⁵ Criminal prosecution for violation of the code results only when

¹⁴For an interesting and provocative discussion of the relationship between *Rabinowitz and Frank*, see Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U.Chi.L.Rev. 664, 704 (1961).

¹⁵See generally, Note, *Enforcement of Municipal Housing Codes*, 78 Harv.L.Rev. 801 (1965). For a discussion of the problems involved in Housing Code enforcement see Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 Colum.L.Rev. 1254 (1966); Comment, *Rent Withholding*, 53 Cal.L.Rev. 304, 314-23 (1965).

the responsible person refuses to act.¹⁶ It should be noted that the person against whom this criminal action is brought may or may not be the occupant whose Fourth Amendment rights are involved.

The extent and quality of a health inspection are entirely different from a search for criminal evidence. Here there is no rummaging through private papers or effects for things which are hidden nor any seizure of personal effects. There is no sudden invasion of privacy through a forced entry as is often, if not usually, the case in criminal searches where contraband may be moved or destroyed. The usual inspection ordinance, similar to the San Francisco ordinance, does not grant any power to force entry where no emergency exists and requires that the inspection be made at a reasonable time. "Reasonable time" can only be interpreted as respect for the convenience and privacy of the occupant so far as practicable. See *Commonwealth v. Hadley* (Mass. 1966). The usual practice if entry is refused is for the inspector to return at another time more convenient to the occupant.¹⁷ If no consent is given after several attempts,

¹⁶See Note, 78 Harv.L.Rev. 801, 814 (1965). Criminal prosecution is generally considered an inadequate method of enforcement, partly because of the reluctance of the courts to impose any significant penalty. See Gribetz & Grad, *supra*, n. 15 at 1276-77, 1280. Demand is increasing for a remedy that will lead to improvement of the building, which in hard core cases, prosecution with a nominal fine fails to do. *Id.* at 1280-81.

¹⁷See Comment, *Administrative Inspections and the Fourth Amendment—A Rationale*, 65 Colum.L.Rev. 288, 292 (1965). We are informed that this is also the practice in San Francisco, and the facts in this case show that it was followed.

an action must be initiated to impose a penalty. This gives the homeowner, as a practical matter, substantial protection.

When the method, i.e., warrant or non-warrant, of conducting health inspections, not their legitimacy, is the question, the ability of the homeowner to control the time is the most important factor. It has been pointed out that an inspector with a warrant "would be more likely than under existing practice to insist on entry and homeowners would be more likely to submit—even though the intrusion might result in the inspector's witnessing conditions and events wholly unconnected with building violations, but nevertheless embarrassing to the occupant." Comment, *Administrative Inspections and the Fourth Amendment—A Rationale*, 65 Colum.L.Rev. 288, 292 (1965). Since the warrant would presumably give the right to force entry if the occupant resisted, the occupant would, in effect, lose an important protection. Thus, the "sanctity of a man's home and the privacies of life" protected by *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), see AOB 28-30, would be more vulnerable to invasion.¹⁸

¹⁸Appellant argues that whether or not the Fourth Amendment prohibits warrantless health inspections, the right to privacy has been violated in the instant case. See AOB 28-30. We have not answered this argument directly because we make no contention that the Fourth Amendment, through the Fourteenth, is inapplicable to health inspections. It seems too obvious to require comment that an inspection at the convenience of the occupant, if reasonable under the Fourth Amendment, does not violate the "right to privacy" considered in *Griswold*. We consider *Olmstead v. United States*, 277 U.S. 438 (1928), equally irrelevant to the instant case, whatever its intrinsic merit.

Finally; the occupant is neither punished nor subjected to a forced search without prior judicial approval. This is considerably more protection of the right to privacy than is given to a person who is arrested and searched before a judicial determination of probable cause. The only "risk" the homeowner takes is being wrong in refusing. Since he may delay the inspection, he has time to find out from the city department whether a routine or area inspection is underway or a complaint has been received. There is no complex set of interrelated facts from which "probable cause" must be determined as in a criminal case. There is a complaint, an observation by an inspector, or a routine requirement for an inspection. The existence of an unsafe condition can be immediately determined, unlike guilt in a criminal case, and can only be determined by inspection.

We, of course, do not contend that a health inspector may assert a right of entry without a reason. As a practical matter, it is highly unlikely that an inspector attempting to conduct an arbitrary or capricious inspection would pursue the matter through a criminal prosecution which could not succeed. This would actually be more protection than an occupant would have if the inspector obtained a warrant in the usual ex parte proceeding. Because of the nature of the "probable cause" which must necessarily be involved, see *Frank v. Maryland*, *supra* at 383 (dissenting opinion), the judge is unlikely to look behind the inspector's assertion.

"To insist upon the use of a search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect seems only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties." *Trupiano v. United States*, 334 U.S. 699, 714-15 (1948) (dissenting opinion).

It is submitted that the kind of system in issue is eminently reasonable, and in view of the urgency of the need and the complexity and variety of the problems involved, reaches an appropriate balance between individual rights and public security.

3. There is no basis for changing the rule of *Frank*.

With one exception,¹⁹ the cases cited by appellant as demonstrating the incompatibility of *Frank* to the Fourth Amendment have little relevance to the problem of health inspections, except as they demonstrate the continuing concern of the courts in the protection of both society and the individual. Appellant, for instance, places great emphasis on *Entick v. Carrington*, 19 How.St.Tr. 1029 (1765). While the general

¹⁹*District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), affirmed on other grounds, 339 U.S. 1 (1950). In *People v. Laverne*, 14 N.Y.2d 304, 200 N.E.2d 441 (1964), cited by appellant (AOB 18), the court held that a penalty for the violation of a zoning ordinance could not be imposed on the basis of evidence obtained in a warrantless search for this purpose, even if the asserted right of entry were proper. The case may be distinguished from the usual enforcement procedure because the penalty was imposed for the existing violation not for a refusal to correct it. However, when the inspection is proper, sanctions ultimately imposed to induce compliance should also be proper.

language of the decision establishes the principle of the sanctity of the home, which we of course affirm, it is hardly relevant to the complex problem at issue here. *Entick* is one of the milestones in English Constitutional history, marking the close of the Crown's contention that its prerogative is part of the common law, and that this prerogative permits action denied to others. Waters, *Rights of Entry in Administrative Officers*, 27 U. of Chi.L.Rev. 79, 80 (1959).

"*Entick v. Carrington* merely decided that, as the common law withheld from all the right to search for and seize evidence to support a civil action, so it withheld from Crown and commoner a similar right in relation to a criminal prosecution—in particular, the utterance of a libel. Indeed, even in approaching this conclusion Lord Camden felt bound to qualify: 'The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, etc., are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good.'" *Id.* at 81. See 19 How.St.Tr. at 1066.

Lord Camden admitted that there were legitimate invasions to this right of property: "That right is presumed sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole." *Ibid.*²⁰ We submit that a health inspection is such a case.

²⁰The comment points out that Lord Camden could not have foreseen the extent to which legislation was to become the medium of reform.

"In a sense, however, the State has taken the place of the Crown, and the old constitutional cases still have importance

Appellant's reliance on *Boyd v. United States*, 116 U.S. 616 (1886), is similarly misplaced. The invasion of privacy deemed unconstitutional in *Boyd* was the forced production, in an action to impose both criminal penalties and forfeiture of goods, of private *incriminating* papers. The case is, in fact, a compelled self-incrimination case: the Court held that such papers cannot be seized with or without a search warrant describing them with particularity.

In both *Marcus v. Search Warrant*, 367 U.S. 717 (1961), and *Stanford v. Texas*, 379 U.S. 476 (1965), First Amendment freedoms were at issue and warrants had in fact been issued. *Marcus* was decided on First Amendment grounds. *Stanford* held that the articles *seized* were not described with the necessary particularity, a requirement of the "most scrupulous exactitude" where First Amendment freedoms are involved.²¹ Apparently neither "search" would in itself have been improper.

in their reiteration of the primacy of the individual in the common law. But how much further do they go? Power is no longer seated in an hereditary Crown, armed to the teeth with prerogative, but in an omnipresent machinery of government claiming a *raison d'être* in the will of the majority. 'The fundamental problem' of this age might also be described as the increasing remoteness of the governed from the processes of democratic government, and the attendant consignment of the individual to an even more remote periphery. Interestingly enough, an English lawyer would barely see the relevance of *Entick v. Carrington* to the solution of this sophisticated problem." 27 U.Chi.L.Rev. at 82.

²¹Some of the books taken were "works by such diverse writers as Karl Marx, Jean Paul Sartre, Theodore Draper, Fidel Castro, Earl Browder, Pope John XXIII, and MR. JUSTICE HUGO L. BLACK." 379 U.S. at 479-80.

This Court, in *Stanford*, noted that the history of the struggle against oppression resulting in the Fourth Amendment had been fully chronicled in the pages of this Court's reports and did not review it again. The Court continued:

"What is significant to note is that this history is largely a history of conflict between the Crown and the press. It was in enforcing the laws licensing the publication of literature and, later, in prosecutions for seditious libel that general warrants were systematically used in the sixteenth, seventeenth and eighteenth centuries.

* * *

"It was in the context of the latter kinds of general warrants that the battle for individual liberty and privacy was finally won—in the landmark cases of *Wilkes v. Wood* [19 How.St.Tr. 1153 (1763)] and *Entick v. Carrington* [19 How. St.Tr. 1029 (1765)]." *Id.* at 482-83.

Certainly the impetus behind the Bill of Rights involved more than protection from searches for criminal evidence and included both the privilege against self-incrimination and freedom of expression. To rely on the above cases to establish that health inspections without a warrant are improper, however, is to become involved in essentially irrelevant considerations. The Fourth Amendment does, of course, protect these rights: the First and Fifth Amendments compel this result. But these basic liberties are not menaced by a health inspector, without authority to seize anything, conducting, at the occupant's convenience, an inspection solely for health and safety hazards.

Moreover, these and the other Fourth Amendment cases cited, indicate that while, of course, both clauses of the Fourth Amendment protect against unreasonable intrusions on individual privacy, the warrant clause is particularly designed to protect against general or indiscriminate seizures.²² Much confusion could perhaps be avoided if these warrants were called "seizure warrants" rather than "search warrants" as a more accurate reflection of their function. Thus, a "search warrant" is totally inappropriate to a health inspection where there is never anything to be seized, nor anything to describe with particularity.

The only case relied on by appellant which considers a health inspection is *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), affirmed on other grounds, 339 U.S. 1 (1950), a two to one decision in the Court of Appeals which reversed a conviction for refusing entry to a health officer.²³

Appellant quotes Judge Prettyman writing for the majority (AOB 18):

²²"The searches meant by the Constitution were such as led to seizure when the search was successful. . . . Hence it is only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for any thing." *Boyd v. United States*, *supra*, at 641 (concurring opinion).

²³"It is worth noting that about two years after the attempted inspection in *District of Columbia v. Little*, 339 U.S. 1, a fire gutted the home of the respondent and burned to death her two year old child. Washington Star, Aug. 6, 1949, p. A-20, Col. 1; Aug. 7, 1949, p. A-7, Col. 7. While the cause of the fire was reported as undetermined, the incident serves as a grim reminder of the kind of loss that can frequently be prevented by municipal inspection." Brief for the Member Municipalities of the National Institute of Municipal Law Officers as Amici Curiae, p. 8, *Frank v. Maryland*, *supra*.

"To say that a man suspected of a crime has a right to protection against search of his home, without a warrant, but that a man not suspected of a crime has no such protection is a fantastic absurdity." 178 F.2d at 17.

This widely quoted statement²⁴ is mischievous nonsense which only obscures the basic issues involved. If the word "search" has a consistent meaning in that sentence, the home of a man *not* suspected of a crime cannot be searched with or without a warrant. Both homes, however, may be subject to a reasonable health inspection. The purpose of the Fourth Amendment is to protect, not those suspected of crime from a proper search, but everyone from arbitrary or oppressive searches.²⁵ In the area of criminal law or forfeitures a search has the most serious repercussions for the individual ranging from the initial abrupt invasion of privacy to undoubted damage to reputation, and subsequent possible loss of liberty itself.

²⁴See, e.g., *Frank v. Maryland*, *supra* at 378 (dissenting opinion); Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup.Ct.Rev. 46, 74. It should be noted that Dean Barrett's criticism was not of the result in *Frank* as to which he took no position.

"It is not meant to suggest that search warrants should necessarily be required for health inspections. Cf. *Way*, *Application of the Fourth Amendment to Civil Proceedings*, 14 Food Drug Cosm. L.J. 534 (1959). Attention here is directed only to the reasons given by the Court for dispensing with the requirement for a warrant." *Id.* at 72, n. 84.

²⁵It is because the method used to assure the protection of the unsuspected is the exclusionary rule that, in application it often "protects" the clearly guilty.

Where both the ultimate consequences to the individual and the actual "invasion" which takes place are radically different, as in health inspections, it is surely not a "fantastic absurdity" to apply a different standard of reasonableness.

In dissenting in *Frank*, Justice Douglas stated:

"Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought. This is not to sanction synthetic search warrants but to recognize that the showing of probable cause in a health case may have quite different requirements than the one required in graver situations." 359 U.S. at 383.

If the standard of probable cause in a health inspection is not that required in a criminal case, it logically follows that the standard applied to determine whether a "search" without a warrant is reasonable is also not that of the criminal case.

In other areas, moreover, the Constitution does in fact give not just different but greater consideration to the privacy of the suspected criminal than to the ordinary citizen. We might easily paraphrase Judge Prettyman: To say that a man suspected of crime has the right to prevent disclosure of his private papers, and to remain absolutely silent, but that a man not suspected of crime has no such right of privacy is a

fantastic absurdity. Is this not, however, the command of the Constitution? See *Boyd v. United States*, 116 U.S. 616 (1886); *Miranda v. Arizona*, 384 U.S. 436 (1966).

In *Tehan v. Shott*, 382 U.S. 406, 416 (1966), this Court in speaking of the privilege against compelled self-incrimination said that it reflected the concern of our society for "the right of each individual to be let alone." This "right to be let alone," however, is fully protected only where the prospect of prosecution is involved.

"All concern for personal dignity disappears when the prospect of prosecution is removed. If privacy were our guide, moreover, we would be hard put to explain why a grocery list, or an automobile repair bill, is protected from disclosure if it incriminates, while disclosure of the most personal entries in a diary may be compelled if they do not incriminate." Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 N.W.U.L. Rev. 506, 513 (1966).

A distinction between criminal and noncriminal, difficult to justify on grounds of privacy where intimate personal revelation may be equally involved in each instance, is both logical and reasonable in interpreting the Fourth Amendment in the context of health inspections: not only are the consequences different,—no loss of liberty or reputation is at stake—but the kind of "invasion" is entirely different.

Appellant also raises the specter of the unlimited extension of administrative searches "if left free of

Constitutional restrictions." To say that a health inspection without a warrant but with statutory safeguards is reasonable is not to say that administrative searches are free of Constitutional restrictions. The determination that a limited search pursuant to a lawful arrest is reasonable does not remove Constitutional restrictions. The same is true of administrative inspections. Each type of administrative inspection or search must be decided on its own facts and circumstances. This is the only approach which can both protect the individual and meet the needs of society.

Neither is this to say that any health inspector has at anytime, on mere caprice, the right to enter a private home. The remote possibility of abuse by an inspector should not determine whether or not a health inspection without a warrant is permitted by the Fourth and Fourteenth Amendments. Possible abuse of the right to make, without a warrant, a reasonable search incident to an arrest, for instance, has not led to a requirement that all searches for criminal evidence be conducted pursuant to a warrant. *Compare Agnello v. United States*, 269 U.S. 20 (1925), with *United States v. Rabinowitz*, 339 U.S. 56 (1950). There is even less reason to apply such a rule to health inspections. The system established, under which arbitrary inspections are not authorized, amply protects the individual.

The possibility that such inspections will be used as a subterfuge by the police to search for criminal evidence is also raised by appellant. He cites, however, only one case when this was attempted (see AOB 23-

24).²⁶ As happened in the case cited, sanctions can be applied and the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), assures that they will be. Most significant in considering this particular problem is the fact that although hundreds of thousands of inspections have taken place so few instances of attempted abuse have arisen.

We submit that appellant has not justified his argument that *Frank* should be reversed nor explained how in fact "privacy" would receive greater protection with a search warrant. He uses the principle that the sanctity and security of the home deserve protection to justify destruction of the programs designed and carried out for this very purpose. Sanctity, security, and privacy in the home are values we all want to protect, but saying this does nothing to solve the problem.

"[O]ne can find in the thought of John Dewey a highly relevant warning against the needlessly devious influence of abstract philosophic premises, and an appeal to the process of accommodation and adjustment for the business of living which is exemplified in the adjudicating function of a constitutional judge.

* * *

"We need guidance in dealing with particular perplexities in domestic life and are met by dis-

²⁶*State v. Pettiford*, a 1959 Maryland case, discussed by Mr. Justice Douglas dissenting in *Abel v. United States*, 362 U.S. 217 (1960). *Abel* involved a search incident to an administrative arrest, pending determination of deportability, on the authority of the Immigration and Naturalization Service. The decision in *Abel* is not necessarily derived from *Frank*, and correct or not, does not relate to *Frank's* continued validity. *Parrish v. Civil Service Com.*, 242 A.C.A. 665 (1966), cited AOB 23, n. 18, did not involve an asserted right to inspect.

sertations on the Family or by assertions of the sacredness of individual Personality.

* * *

“The waste of mental energy due to conducting discussion of social affairs in terms of conceptual generalities is astonishing.

* * *

“Not only does the solemn reiteration of categories of individual and organic or social whole not further these definite and detailed inquiries, but it checks them. It detains thought within pompous and sonorous generalities wherein controversy is as inevitable as it is incapable of solution. . . .” Freund, *Umpiring the Federal System*, 54 Colum.L.Rev. 561, 575-76 (1954) (quoting from Dewey, *Reconstruction in Philosophy*, 188-89, 198-99 (enlarged ed. 1948)).

4. Persuasive reason for retaining the rule of Frank is found in history, in the near unanimity of opinion of those courts which have considered the problem, and in the continuing legislative approval of such inspections.

“[W]hat free people have found consistent with their enjoyment of liberty for centuries is hardly to be deemed a denial of due process. . . .” *Frank v. Maryland*, 359 U.S. 360, 371 (1959).

Among the factors considered by the *Frank* Court in reaching its conclusion was the long history of warrantless health inspections conducted from pre-revolutionary days in Maryland and other colonies. The Court considered that these inspections, occurring both before and after the adoption of the Fourth Amendment and state constitutional analogues were of persuasive significance. There is no reason to repeat

this history nor to cite to similar histories in other states.²⁷ It is pertinent to note, however, that the history of these local and state statutes indicates the changing concern of the legislative bodies as the problems of their constituencies change. It was not until the late nineteenth and early twentieth centuries that housing conditions became of enough concern to engender significant action in the enactment of adequate codes.

"The beginning of modern code enforcement in America may be placed at the turn of the century, with the enactment in 1901 of the Tenement House Act for New York City. Thus, housing codes and code enforcement for the benefit of the inhabitants are of very recent origin, when compared, for instance, with the common law antiquities of the law of landlord and tenant. Prior to our century, to be sure, there had been building codes and other laws relating to dwellings but their major concern had been the protection of the city from conflagration and building collapse. Regulations to protect the tenants themselves were scant, and were generally limited to provisions aimed at preventing nuisances and limiting the spread of communicable disease. The need for housing codes to protect the inhabitants themselves is a fairly recent phenomenon of the growth of cities." Gribetz & Grad, *Housing Code Enforce-*

²⁷See *People v. Laverne*, *supra*, for a brief discussion of such statutes in New York. See also, *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 305, 321-22 (1905) (dictum): "The householder may be compelled to submit even to an inspection of his premises, at his own expense, and forbidden to keep them, or allow them to be kept, in such condition as to create disease."

ment: *Sanctions and Remedies*, 66 Colum.L.Rev. 1254, 1259-60 (1966); see generally *id.*, at 1259-67.

The first housing law was enacted in California in 1909, and because the major growth of California's cities has occurred since then, has "prevented widespread slums from developing in this state to the same degree they have in many other states." California Housing Report and Recommendation of State Commission on Housing at 11 (1954). As Mr. Justice Frankfurter pointed out in *Frank*, "There is a total want of important modification in the circumstances or the structure of society which calls for a disregard of so much history." 359 U.S. at 371. Indeed, the changes in society have intensified the problems and increased the necessity.

We submit that equally significant is the fact that the Courts and the elected representatives of this present day free people have also deemed it consistent with freedom and due process that such inspections take place without a prior search warrant. The courts which have reviewed such authorizations have, with the exception of the District of Columbia Circuit in *Little*, recognized the need and determined that it outweighed the small inconvenience to the individual.

Prior to the California and Washington decisions now before this Court, the highest Courts of three states considered similar ordinances and reached the same result. See also, *DePass v. City of Spartanburg*, 107 S.E.2d 350 (S.C. 1959).

In *Givner v. State of Maryland*, 210 Md. 484, 124 A.2d 764 (1956), the Court of Appeals of Maryland

held that an ordinance almost identical with section 503 was not unconstitutional in permitting an inspection without a search warrant. The Court concluded that an inspection by a health inspector is made in the exercise of lawful police power and that the need for combating urban blight and the growth of slum conditions, as well as the need for enforcement of minimum housing standards for safety and sanitation, overrides any invasion of privacy which may be incurred by the inspection.

In *City of St. Louis v. Evans*, 337 S.W.2d 948 (Mo. 1960), the Supreme Court of Missouri followed *Givner* in holding that building and health inspectors had a right to enter pursuant to an ordinance similar to section 503. The St. Louis ordinance, in addition, permitted the official to invoke the aid of the police department to enforce his right of entry if denied. The Court found that prohibitions against unreasonable searches and seizures do not prohibit reasonable searches, and while the Fourth Amendment is primarily designed to protect the individual in the sanctity and privacy of his home, books, papers, and property, it does not apply to reasonable rules and regulations adopted in the exercise of the police power for the protection of the public health, morals and welfare.

The third case is that which was affirmed by the equally divided Court in *Ohio ex rel. Eaton v. Price*, *supra*. Considering an ordinance with terms nearly identical to those of section 503 of the San Francisco Housing Code, the Ohio Court held unanimously that

defendant's conviction for refusing entry should be affirmed, on the ground that the provision for inspection in the exercise of the police power to protect the public health of the citizens of the City of Dayton was not an unreasonable search. *State v. Price*, 168 Ohio St. 123, 151 N.E.2d 523, *aff'd*, *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960).

Subsequent to the decisions in issue here and in *See v. Seattle*, No. 180, the Supreme Judicial Court of the Commonwealth of Massachusetts reached the same result in considering an ordinance which imposed a fine for refusing to permit an inspection as an alternative to a bill in equity to require the person to admit the inspector. The Court considered that the defendant could raise the defense that the inspection was unauthorized, unreasonable or discriminatory. *Commonwealth v. Hadley* (Mass. 1966).

Perhaps most significant, these inspection ordinances represent the consensus of the people, through their elected representatives, that the interests of all are best served, and that freedom and liberty are not threatened, by health and safety inspections without a warrant. Thus, the necessity for health inspections is not left to the discretion of a policeman or a petty official, but represents the consensus of the community. The procedures established provide not for a warrant but for substantially equivalent protection against arbitrary inspections. That such an equivalent system for the protection of Constitutional rights is proper is suggested by this Court in *Miranda v. Arizona*, *supra*.

While these statutes and decisions do not, of course, control this Court in its Constitutional adjudications, they do represent the considered views of legislatures and courts equally devoted to the maintenance of liberty and the support of the Constitution and should not lightly be dismissed.

- C. The Circumstances Involved In The Routine Inspection At Issue Present Stronger Reasons Than Those In *Frank* For Finding That A Right To Inspect Without A Prior Warrant Is Reasonable.

Appellant argues that even if *Frank* is not overruled, the San Francisco ordinance at issue here is unconstitutional because no probable cause is required (AOB 25). We contend that such an inspection without a warrant is reasonable. If a warrant is not required in *Frank* there is even less reason to require one for the routine inspection in this case.

1. The authority granted by the San Francisco ordinance is solely for the purpose of protecting the welfare of the public, and is carefully circumscribed.

In section 101 of the *San Francisco Housing Code*, the policy of the City and County of San Francisco in adopting the code is stated:

"Sec. 101. *Declaration of Policy.* It is found and declared that there exist in the City and County of San Francisco substandard and insanitary residential buildings and dwelling units whose physical conditions and characteristics render them unfit or unsafe for human occupancy and habitation, and which conditions and characteristics are such as to be detrimental to or jeopardize the health, safety, and welfare of their occupants and of the public.

"It is further found and declared that there exist in the City and County of San Francisco residential buildings and dwelling units which were legally constructed according to standards now generally recognized to be obsolete and deficient in terms of current, modern housing standards for construction, use, occupancy, light and ventilation and sanitary facilities. *The continued existence of these obsolete and deficient residential buildings and dwelling units is detrimental to or jeopardizes the health, safety, and welfare of their occupants and of the public.*

"It is further found and declared that the existence of such substandard, insanitary, obsolete and deficient buildings and dwelling units threatens the physical, social and economic stability of sound residential buildings and areas, and of their supporting neighborhood facilities and institutions; necessitates disproportionate expenditures of public funds for remedial action; impairs the efficient and economical exercise of governmental powers and functions; and destroys the amenity of residential areas and neighborhoods and of the community as a whole.

"For these reasons it is hereby declared to be the policy of the City and County of San Francisco:

"1. *That it is in the public interest of the people of San Francisco to protect and promote the existence of sound and wholesome residential buildings, dwelling units and neighborhoods by the adoption and enforcement of such standards, regulations and procedures as will remedy the existence or prevent the development or creation of dangerous, substandard, insanitary or obsolete*

and deficient residential buildings and dwelling units.

"2. That the adoption and enforcement of a Housing Code is a necessary municipal governmental function in the interest of the health, safety, and welfare of the people of San Francisco." (R 75-76). (Emphasis added)

The purpose of the code, expressed in section 103, is

"to provide minimum requirements for the protection of life, limb, health, property, safety, and welfare of the general public and the owners and occupants of residential buildings, erected or to be erected in San Francisco. . . ." (R 76).

The Housing and Building Codes establish comprehensive regulations to assure that occupied residential buildings do not menace either safety or health. In order to enforce these substantive provisions, both codes contain enforcement provisions. Section 503 of the Housing Code, at issue in this case, grants the authority to enter without individual probable cause. This authority, however, is carefully circumscribed: only authorized employees of city departments or agencies may enter; they may enter only on presentation of proper credentials; they may enter only when necessary for the performance of the duties imposed upon them by the Municipal Code; they have the right to enter only at reasonable times; and, most important, they have no power to force entry.

Thus, with the exception of the requirement for cause related to a particular residence, the limitations

are similar to the Baltimore ordinance approved in *Frank*. See 359 U.S. at 366-67. In lieu of "cause to suspect that a nuisance exists," the San Francisco ordinance imposes the limitation that an inspection must be necessary for the performance of duties imposed by the Municipal Code. Under the Municipal Code the duty of inspecting, at least once a year, all apartment houses for conformance with the housing code is imposed on the Division of Housing Inspection of the Department of Public Health. San Francisco Municipal Code, part III, § 86 (R 36-37).²⁸

Other inspections are the responsibility of different officials depending on whether the inspections are within rehabilitation or conservation areas. See Housing Code § 501 (R 80). A conservation area is an area which is to be protected from blighting influences and maintained in a safe and sound state. Housing Code § 203.3 (R 77). A rehabilitation area is one in which deteriorated structures are to be improved or restored to good condition by repair, renovation, conversion, remodeling, reconstruction or the addition of needed improvements. Housing Code § 203.18 (R 78).

Both areas must consist of at least one block within which planned area inspection is necessary to promote the public safety, health, and welfare. See Housing Code §§ 203.3, 203.18 (R 77, 78). The planned area inspection required is the inspection of all residential buildings within the designated area for the purpose of determining and eliminating all violations of the

²⁸Section 120, not at issue, imposes a similar duty with regard to hotels.

code, and includes a study to determine whether conditions in the area involve aspects of urban renewal. § 203.16. Urban renewal includes activities and undertakings for the elimination and the prevention of the development or spread of blighted areas. § 203.21. The Director of Public Works, through the Superintendent, has the duty to enforce the provisions of the code in these areas.

These are the only inspections authorized to take place as a matter of routine without a reason related to the individual residence, apartment or building. Under Building Code section 802 (App. 4), authority is granted to authorized employees to enter any building thought to be unsafe, illegal, or a menace to life or limb. The Department of Public Works also conducts inspections of all new construction and of alterations done under a building permit. Thus, the San Francisco Municipal Code provides specifically for some routine or area wide inspections, or for entry on cause, but does not grant a power to inspect arbitrarily.

In carrying out these inspections both the Health and Public Works Departments will return several times, if necessary, to reach an accommodation of convenience with the occupant (unless, of course, some emergency exists). It is only when there is a continued refusal without cause, or an indication, as in the instant case, that no consent will be given, that further procedures are taken. Even then, the individual is first cited to the district attorney to show cause why a complaint should not be issued. He, thus,

has an additional opportunity to consent. It is submitted that this procedure insures that no arbitrary inspection will be insisted on by a "petty official" and that the occupant is, in fact, taking no risk in his initial refusal. It taxes credulity to believe that the inspector would continue to insist and that the district attorney would file a complaint if the proposed inspection were arbitrary. Thus, the occupant has not only the substantial practical protection discussed earlier, but an additional opportunity to insure that arbitrary action is not being taken. In this case, appellant was fully aware that the inspection was not arbitrary but was attempted pursuant to this law, and concedes that he has no defense if such an inspection is constitutional (R 61). See AOB 7 n. 4.

The basic purpose of the ordinance is to achieve compliance and obtain for the cities the benefits of safe housing, not to impose criminal sanctions. Public health and safety programs are grounded on the concept that it is through prevention of conditions which result in health and safety hazards, and not in the punishment of violations, that the public welfare is best protected. Effective administration of these programs depends on prompt response to complaints, continued periodic inspections by trained inspectors and the correction of the condition.

The Housing and Building Codes contain provisions providing for notice of substandard conditions, hearings, appeals, and procedures for abatement. See Housing Code §§ 502, 505, 1701-08 (R 80-83, 93-95); Building Code §§ 802-04-I (App. 4-9); Health Code

§§ 596-99 (App. 12-16). Criminal prosecution is resorted to only after all other measures have failed (see R 70). The fact that such a sanction may be used is important to achieve compliance; however, it is abatement which is desired.

Finally, as pointed out earlier, the occupant may not even be the one against whom such action is taken.

Under these ordinances, the San Francisco Department of Public Works conducted 145,589 inspections in 1964. This included inspections of new construction, inspections of existing buildings, and investigations in connection with permit applications. Between July 1, 1964 and June 30, 1965, the Department of Public Health inspected 16,053 apartment buildings on 50,014 inspection trips. Since these apartment buildings contain varying numbers of rooms, the number of dwelling units inspected would be many times this number. In the Urban Renewal Program, ten areas have been designated for code enforcement programs. In these areas, since 1959, 4,734 buildings containing an estimated 14,500 dwelling units have been inspected and 3,543 violations detected. In the yearly period covered by the last annual report only 150 complaints were received.²⁰

The number and variety of these inspections are such that the necessity for prior warrants could effectively destroy the entire program. It is respectfully submitted that the dissenting opinions in both

²⁰Inspection figures compiled in the report submitted annually to the Department of Housing and Urban Development are contained in the Appendix at 23, 26, 27.

Frank and *Eaton* and the majority opinion of the Court of Appeals in the *Little* case have not squarely met the issue involved: How are these thousands of daily inspections, solely for the purpose of protecting the health of the public, to be conducted if the right to inspect is conditioned on a prior search warrant?

As justification for the imposition of a search warrant as a prerequisite for asserting the right to conduct a routine inspection, Mr. Justice Douglas cites the thousands of inspections made annually in Baltimore and the fact that the number of prosecutions for refusing to permit entry have averaged one per year. He then states:

"Submission by the overwhelming majority of the populace indicates there is no peril to the health program. One rebel a year (*cf.* Whyte, *The Organization Man*) is not too great a price to pay for maintaining our guarantee of civil rights in full vigor." 359 U.S. at 384.

While there may be only "one rebel a year" where officials have a right to inspect without a warrant, it cannot be said that such would be the case when there is no right to enter without a warrant. San Francisco has for three years conducted a Home Fire Safety Program where fire safety inspections are made of dwellings on a consent basis—no right to inspect is asserted.³⁰ In this period, 46,848 homes were con-

³⁰See Fire Code § 1.04 (App. 11-12). This section was amended in 1965 to require the consent of the occupant of any dwelling (one or two families) for entry. Prior to this, although authority for entry was not so restricted, this program was administered solely on a consent basis.

tacted where someone was at home. In 7,244 cases the occupant refused to permit the inspection (See App. 38). If this proportion, in excess of 15%, were applied, for instance, to the conservation program inspections enumerated above, in excess of 2000 search warrants would be required. Applied to the inspections made by the Department of Public Works, more than 21,000 warrants would be required.⁸¹ The inspectors and the courts could not handle this volume.

Moreover, as established by this Court in *Rabino-witz*, it is not the practicality of obtaining a warrant which is controlling, but whether or not the search is reasonable.

2. Where a routine inspection is involved, no purpose whatever would be served by a prior warrant requirement.

The dissenting opinions in both *Frank* and *Eaton* indicate that the purpose of obtaining a warrant is to insure that an objective mind will weigh the need to invade privacy to enforce the law. In a case based on a complaint, or on probable cause to believe a violation is taking place, there are at least facts and witnesses which the Court could consider in making a determination.

In the case of the San Francisco ordinance, there has been a legislative determination that there is a need for annual inspections and planned area inspections where administrative agencies make an appro-

⁸¹We make no claim that such results would necessarily follow; the figures, however, strongly indicate that Mr. Justice Douglas' prediction of "one rebel a year" may be too optimistic.

priate determination. There are, however, no additional "facts" relating to any individual situation which the judge could weigh. It was pointed out by the dissenting judge in *Little*:

"Moreover, even if an Act providing for such search warrants should be placed upon the statute books, how can an inspector make a showing of probable cause as a basis for the issuance of a warrant for the purpose of an ordinary, routine examination? Regular periodic inspections are conducted for the purpose of making certain that laws relating to sanitation and safety are being observed If a search warrant were necessary for such recurring inspections, the requirement would amount to turning over the supervision of administration from the executive to the judicial branch of the Government, which, as the Supreme Court has observed in the past, would be a source of mischief and is contrary to the philosophy of our form of Government." 178 F.2d at 24.

What purpose is served, for example, in interposing a magistrate in the circumstance of a planned area inspection? The responsible agencies make an administrative determination, using their expertise in the field of planning and urban design, that an area can be preserved or rehabilitated. Essential to the program is the inspection of every building in the area. When an occupant asserts a "right" to refuse entry, if the official must then get a warrant, what does the magistrate do? If he must accept the administrative decision, he serves no function because there is no weighing of the need to invade privacy. Is this judi-

cial seal of approval then good for the whole area, or must the official return for a new determination on each refusal? If the judge is not merely a "rubber stamp," is he expert enough to make the final decision as to whether an area is to be rehabilitated? This would seem to be a determination more appropriately made by the agency with expertise in the field. If he does make this decision, what happens when the second occupant refuses to consent to entry, a different judge hears the case, and a different determination is made? A rehabilitation program can only succeed when the whole area is treated uniformly.

Moreover, there is widespread citizen participation and involvement in the selection of areas to be conserved or rehabilitated. An indication of this planning on all levels of local government can be seen in the Annual Report on the San Francisco Workable Program. Some relevant excerpts from this report have been reproduced (See App. 28-38).

Much the same considerations apply to the routine inspection of apartment houses attempted in this case. There has been a determination that such periodic inspections are necessary on the legislative level closest and most responsive to the problems of the city and the welfare of the residents. The necessity for, and the procedures to be used in, these inspections are under constant local legislative and citizen review. The right of entry has been curtailed where experience has shown it is unnecessary or where possible inconvenience to the occupant is thought to outweigh the benefits. See n. 30, *supra*.

Therefore, it is apparent that a routine inspection pursuant to this carefully circumscribed ordinance presents even a stronger case than *Frank* for a determination of reasonableness.³² As previously pointed out, however, there is no real reason for imposing a search warrant requirement even in the *Frank* situation; the protections are the same and fully adequate to insure against arbitrary and oppressive inspections. These health and safety inspections are so complex and inter-related that a warrant requirement for any single type would result in enormous difficulty.

Some indication of this complexity can be seen in the circumstances of the instant case. The health inspection was attempted because the Municipal Code required such inspections to be made routinely. Once the inspector had learned that appellant was allegedly living in commercial premises, there was, in fact, a reason to inspect based on individual cause. There was a greatly increased likelihood that a safety hazard

³²See Mr. Justice Black's comment in *District of Columbia v. Little*, 339 U.S. 1, 3 (1950):

"At one extreme the district argues that the Fourth Amendment has no application whatever to inspections and investigations made by health officers; that to preserve the public health, officers may without judicial warrants enter premises, public buildings and private residences at any reasonable hour, with or without the owner's consent. At the opposite extreme, it is argued that no sanitary inspections can ever be made by health officers without a search warrant, except with a property owner's consent. Between these two extremes are suggestions that the Fourth Amendment requires search warrants to inspect premises where the object of inspections is to obtain evidence for criminal punishment or where there are conditions imminently dangerous to life and health, but that municipalities and other governing agencies may lawfully provide for general routine inspections at reasonable hours without search warrants."

endangering the other tenants had been created through unauthorized or unapproved heating, cooking, or plumbing installations. Moreover, appellant was illegally "living" in *commercial* premises. If different "warrant" requirements are imposed for inspections on cause, for routine inspections, or for inspections of commercial premises, into which category does this attempted inspection fall? The entire program of commercial inspections could be curtailed through the simple expedient of alleging that, in fact, an unauthorized residence had been created.

We contend that a constitutionally imposed search warrant requirement for health inspections would create far more problems than would be solved. The result would be both confusion and an enormous burden on the courts, with no more protection of the right to privacy than now exists.

CONCLUSION

The attempt by the City and County of San Francisco to preserve and improve the quality of its housing represents a valid exercise of the city's police power. To impose a requirement of a prior search warrant could make it nearly impossible to carry out the regular inspections vitally necessary for the success of the program. The nature of the obligation of the individual as a member of the public, and the purpose of the ordinance, solely to protect the public health, distinguish this kind of inspection from a search for criminal evidence: the liberty of the indi-

vidual is not at stake, but the health and safety of the public is. It is surely not too much to ask that each individual give up a small portion of his absolute privacy in order that all individuals may be secure.

The Constitution today must be a growing and flexible document, reflecting the problems and protections needed in an increasingly complex and interdependent society, and not a document of rigid absolutes unrelated to considerations of the needs of society and the nature of the individual interests concerned.

For these reasons, it is respectfully submitted that the judgment of the District Court of Appeal be affirmed.

Dated, San Francisco, California,
January 16, 1967.

THOMAS C. LYNCH,

Attorney General of the State of California,

ALBERT W. HARRIS, JR.,

Assistant Attorney General of the State of California,

GLORIA F. DEHART,

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Real Party in Interest.*

(Appendix Follows)

Appendix

CALIFORNIA PENAL CODE

§ 1524. [Grounds for issuance: From whom or where property may be taken.] A search warrant may be issued upon any of the following grounds:

1. When the property was stolen or embezzled.
2. When the property or things were used as the means of committing a felony.
3. When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered.
4. When the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be. [Enacted 1872; Am. Stats. 1899, p. 87; Stats. 1957, ch. 1884, § 1.]

HEALTH AND SAFETY CODE

§ 17970. Entry and Inspection of Building or Premises. Any officer, employee, or agent of an enforcement agency may enter and inspect any build-

ing or premises whenever necessary to secure compliance with, or prevent a violation of, any provision of this part and rules and regulations promulgated thereunder which the enforcement agency has the power to enforce.

Added by Stats 1961 ch 1844 § 8.

§ 17972. Entering Dwellings Between 6 p.m. and 8 a.m.: Consent of Owner or Occupants: Court Order. No person authorized by this article to enter buildings shall enter any dwelling between the hours of 6 o'clock p.m. of any day and 8 o'clock a.m. of the succeeding day, without the consent of the owner or of the occupants of the dwelling, nor enter any dwelling in the absence of the occupants without a proper written order executed and issued by a court having jurisdiction to issue the order.

Added by Stats 1961 ch 1844 § 8.

§ 17983. Orders of Superior Court. The Superior Court may make any order for which application is made pursuant to this article.

Added by Stats 1961 ch 1844 § 8.

§ 19825. Code Provisions not Applicable Within City Having and Enforcing Ordinance Prescribing Minimum Standards Equal to or Greater Than Provisions of This Division: Construction of Chapter: When Provisions Effective in City. (a) The provisions of [1] *Part 1.5 (commencing with Section 17910)* of this division and of Chapter 1 (commencing with Section 19000), Chapter 2 (commencing with Section

19100), and Chapter 3 (commencing with Section 19300) of Part 3 of this division shall not apply within any city having and enforcing a local ordinance prescribing minimum standards equal to or greater than such provisions of this division; such local ordinance shall supersede such provisions of this division.

* * *

(c) The provisions of this chapter shall be effective only in a city where the legislative body determines that an ordinance described in subdivision (a) of this section is in force and effect and so notifies the state department presently charged with enforcement of the provision of this division if a state department be so charged. [Amended by Stats 1961 ch 1844 § 11.]

SAN FRANCISCO BUILDING CODE SECTIONS 801-806.A

Sec. 801. Enforcement. The Superintendent is the authorized representative of the Director in the enforcement of this Code. Whenever it shall be necessary, in the opinion of the Superintendent, to call upon the Police Department for aid or assistance in carrying out, or enforcing, any of the provisions of this Code, which it is his duty to enforce, he shall have the authority to do so, and it shall be the duty of the Chief of Police, or of any member of the Police Department, when called upon by the Superintendent, to act according to the instructions of, and to perform

such duties as may be required by, the Superintendent in order enforce or put into effect the provisions of this Code that it is his duty to enforce.

Sec. 802. Right to Enter Buildings. Authorized employees of City departments, so far as may be necessary for the performance of their duties, shall have the right to enter any new or unoccupied building or any building under construction, repair, alteration or removal, or any building thought in whole or in part to be illegal, unsafe, or a menace to life and limb, upon showing their badges of office.

Sec. 803. Stopping Construction. The Superintendent shall have the power to stop the grading, filling or excavating of land, or the construction, alteration or repairs of any structure when, in his opinion, such work is being done in a dangerous, reckless or careless manner, or in violation of any of the provisions of this Code and to order all work to be stopped. The work shall be stopped immediately and shall not be resumed without authorization from the Superintendent.

The Superintendent may disapprove any application for a building permit to alter or build upon a building which is an unsafe structure, as defined in Section 804.A., until a permit is first obtained to correct all unsafe features and the entire building is put in a safe condition.

Sec. 804. Unsafe Buildings. Unsafe buildings shall be determined and subject to Sections 804.A through 804.I. (*Amend. Ord. 179-62, app. 7-13-62*)

Sec. 804.A. General: All buildings, structures, or parts thereof, which are structurally unsafe or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to existing approved use constitute a hazard to safety by reason of inadequate maintenance, dilapidation, obsolescence or abandonment, or were erected, altered or moved without a permit, or are hereafter erected, altered, constructed or maintained in violation of this Code, are for the purpose of this section unsafe buildings. All such unsafe buildings are hereby declared to be public nuisances and shall be abated by the Director, as hereinafter provided.

Sec. 804.B. Complaints. The Superintendent shall examine, or cause to be examined, every building or structure, or portion thereof coming within the provisions of the preceding subsection, and, if found to be an unsafe building, he shall file written complaint with the Director which shall contain specific allegations, setting forth the conditions complained of.

Sec. 804.C. Notice of Hearing. Upon the filing of such complaint the Director shall cause a copy thereof, together with a notice of the time and place set for the hearing thereof, to be served either personally or by registered or certified mail upon the owner of said building, or part thereof complained of, or his agent, and shall cause a copy of said complaint, together with the said notice of hearing, to be posted in some conspicuous place on said building. If the owner does not reside in San Francisco, and has no

agent in San Francisco, the time fixed for the hearing of said complaint shall be not less than forty-eight (48) hours after the service and posting of the copy of the complaint and notice. The time of hearing shall be extended one (1) day for each six hundred (600) miles the owner is distant from San Francisco, but in no event shall such extended time be more than five (5) days from the date of mailing. The notice shall require all persons interested to appear at the hearing to show cause, if any they have, why said structure, building or part thereof complained of, should not be declared unsafe and a public nuisance. (*Amend. Ord. 179-62, app. 7-13-62*)

Sec. 804.D. Hearing. The public hearing shall be held on the day and hour, and at the place designated in the notice of hearing, at which time the Director will consider the facts of the case.

Sec. 804.E. Decision. The Director, upon conclusion of said hearing, shall decide upon the facts submitted whether or not the building complained of constitutes a nuisance under this section and shall set forth his decision in a formal statement which shall include his findings and order of condemnation.

Sec. 804.F. Order.

1. **Order of vacation and demolition.** The Director upon his findings and determination that the building, or part thereof, complained of is a public nuisance shall order the demolition of or the vacation of the same for all purposes and uses, and shall cause a copy of said order to be posted in a conspicuous place on the

building, or part thereof, determined to be a nuisance, and a copy of said order shall be served either personally or by registered mail upon the owner or his agent. The order shall specify the time within which said building, or part thereof, declared to be a nuisance shall be vacated, which shall be not less than forty-eight (48) hours after the service on the owner or agent, if resident of San Francisco, and not less than seventy-two (72) hours if the owner, or his agent, are non-residents of San Francisco.

Exception: In the case of extreme and immediate danger to the structure, or to persons in or around such structure, the order may specify immediate vacation without the notice of, or the public hearing, as set forth in Section 804.D.

2. Order of restoration. The Director upon his findings and determination that the building, or a part thereof, may be repaired, altered or reconstructed to comply with all applicable laws may order the owner, or his agent, to secure within a stipulated time all necessary permits, and to perform the work, as set forth in the applications for such permits, within a definite period.

Sec. 804.G. Abatement. Unless within forty-eight (48) hours after the service of notice to vacate, as provided above, the owner or his agent of the building, or part thereof declared to be a nuisance, shall notify the Director in writing that he will make, or

cause to be made, such alterations or repairs as in the judgment of the Director shall be necessary for the purpose of making said building or part thereof safe, the Director shall proceed to abate said building or part thereof. The Director, upon receiving written notice of the intention to comply by the owner or his agent, may grant a reasonable time to make alterations or repairs to rehabilitate said building or part thereof. If the alterations, repairs or rehabilitation, as provided for herein and in Section 804.F, are not made and completed within the time allowed by the Director, said Director shall order the abatement of the building, or portion thereof declared to be a nuisance, and shall have the same demolished and destroyed. The Director's order of condemnation together with allegations shall be filed with the County Recorder.

Sec. 804.H. Lien for Costs. Upon the written application therefor by the Director, the Board of Supervisors shall allow and order paid out of such fund, as the said Board of Supervisors may lawfully specify, any sum of money which may be necessary for the enforcement of this section, and the Controller shall audit and the Treasurer shall pay such sum so allowed and ordered paid, and the amount so expended to abate such nuisance shall become a lien upon the property upon which said nuisance was abated and said lien shall have priority over all other liens except those for taxes, and the said sum of money may be recovered by San Francisco by an action against said property or the owner or owners thereof.

Sec. 804.I. Reoccupation. When the building, or part thereof, which was declared to be a nuisance, is certified by the owner or his agent to comply with the requirements of the Director as to rehabilitation, alteration or repair, the Director shall cause inspection to be made of such building or part thereof. If it is found that the building is no longer unsafe, the Director shall grant in writing permission to reoccupy the same.

Sec. 805. Penalty for Violation. Any person, the owner or his authorized agent, who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment, not exceeding six (6) months, or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue. Any person who shall do any work in violation of any of the provisions of this Code, and any person having charge of such work who shall permit it to be done, shall be liable to the penalty provided.

It shall be unlawful for any person to interfere with the posting of any notice provided for in this article, or to tear down or mutilate any such notice so posted by the Department of Public Works in or upon any building or premises.

See Section 317.J for penalties for mismanagement of boilers.

See Section 324.E for penalties relating to signs.

Sec. 806. Board of Examiners.

Sec. 806.A. Establishment. There is hereby created a Board of Examiners, consisting of five (5) members who are qualified by experience and training to pass upon matters pertaining to building design and construction. Its functions shall be:

1. To determine whether specific new materials, new methods and types of construction comply with the standards of safety established by this Code; and to recommend the approval or disapproval of such new materials, new methods and types of construction;
2. To determine whether variances from the requirements of this Code should be approved for specific cases where new materials, new methods and types of construction are not involved, and where the enforcement of compliance therewith would result in unreasonable hardship;

It is the intent of this section that new materials, new methods and types of construction, which do not comply with the standards of safety established by this Code, shall in no event be approved; but that the requirements of this Code, other than those involving such standards of safety, may be waived under the circumstances hereinafter set forth;

3. To determine reasonable interpretations of the provisions of this Code.

The term "Standards of Safety," as used in this section, shall mean the general degree of safety conforming to the provisions of this Code as required to safeguard life or limb, health and public welfare.

SAN FRANCISCO FIRE CODE SECTION 1.04

Sec. 1.04 Authority to Enter Premises

(a) The Chief of Department and the Chief, Division of Fire Prevention and Investigation, or any of their duly authorized representatives, may enter any building or premises, for the purpose of making any inspection, or investigation which, under the provisions of this code, he or they may deem necessary to be made.

(b) The above referred to right of entry shall be exercised only at reasonable hours, and entry shall be made to any dwelling only with the consent of the owner or tenant thereof, or with the written order of a competent court.

(c) The Chief of Department and the Chief, Division of Fire Prevention and Investigation, or any of their duly authorized representatives, shall have the authority to enter any building or premises at any time for the purpose of extinguishing or controlling any fire; performing any rescue operations; investigating the existence of suspected or reported fires, gas leaks, or other hazardous conditions.

(d) Any person who, at the scene of a fire or other emergency requiring the operations of the Fire Department, disobeys the lawful orders of the Chief of Department, or his duly authorized representative; or offers any resistance to, or interference with, the operations of the Fire Department at any fire or any other emergency; or engages in any activity calculated to prevent the extinguishment of any fire; or forbids, prevents or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor.

SAN FRANCISCO HEALTH CODE SECTIONS 596-600

"Sec. 596. Insanitary Buildings, Etc. (a) Definition. All Buildings, structures, or parts thereof which are insanitary are hereby declared to be and are nuisances, and the Director of Public Health is hereby authorized and empowered to abate the same in the manner provided in Sections 596 to 600, inclusive, of this Article.

(b) Complaints. Whenever a written complaint shall be made to the Director of Public Health that any building, structure or part thereof is in an insanitary condition, the said Director shall order a hearing of said complaint and fix the time and place therefor. The complaint shall contain specific allegations setting forth the conditions complained of.

(c) Notice of Hearing. Upon the filing of such complaint, the Director of Public Health shall cause a copy thereof, together with a notice of the time and place set for the hearing thereof, to be served personally upon the owner of said structure, building or

part thereof complained of, or his agent, or the lessee, or the occupant thereof, and shall cause a copy of said complaint, together with said notice of hearing, to be posted in some conspicuous place on said structure. The time fixed for the hearing of said complaint shall not be less than forty-eight (48) hours after the service and posting of the copy of said complaint and said notice. Said notice shall require all persons interested to appear at the hearing to show cause, if any they have, why said structure, building or the part thereof complained of, should not be declared insani-
tary.

(d) Decision. The Director of Public Health, upon conclusion of said hearing, shall decide upon the facts submitted whether or not said alleged condition constitutes a nuisance under the terms of Sections 596 to 600, inclusive, of this Article and shall embody said decision in a formal statement setting forth his findings.

(e) Order of Vacation, Etc. The Director of Public Health, upon his determination and finding that the structure, building or part thereof complained of, is a nuisance, shall order the vacation of same for all purposes, and shall cause a copy of said order to be posted in a conspicuous place on the afore-said structure, building or part thereof determined by said Director to be a nuisance, and a copy thereof to be personally served upon the owner thereof or his agent, or the lessee or the occupant thereof. The order shall specify the time within which said structure, building or part thereof determined by said Director

to be a nuisance shall be vacated, which shall not be less than forty-eight (48) hours after the passage of said order and the personal service thereof as above provided.

"Sec. 597. Notice to Police Department. The Director of Public Health shall give written notification thereof to the Chief of Police, who shall thereupon, through the officers of the Police Department, execute and enforce the said order of vacation.

"Sec. 598. Penalty for Resisting Order. Any owner, or the agent of such owner, or the lessee, or the occupant of any structure, building or part thereof ordered vacated hereunder who shall himself or through others forcibly resist or prevent the enforcement of such order shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than Twenty-Five (\$25.00) Dollars, nor more than Two Hundred and Fifty (\$250.00) Dollars, or by imprisonment in the County Jail for a period of not less than ten (10) days nor more than three (3) months, or by both such fine and imprisonment.

"Sec. 599. Abatement. (a) Notice to Director. Unless within forty-eight (48) hours after the service of notice to vacate as above provided, the owner, or his agent, or the lessee, or the occupant of said building, structure or part thereof, shall notify the Director of Public Health in writing that he will make or cause to be made such alterations or repairs as in the judgment of the Director of Public Health shall be necessary for the purpose of making said

building, structure or part thereof sanitary, the Director of Public Health shall proceed to abate the same. If said notice be given as aforesaid the Director of Public Health shall grant a reasonable time to make said alterations and repairs. If said alterations and repairs are not made and completed within said time allowed by said Director, the Director of Public Health shall by formal statement, order, and in accordance with said order, cause the abatement of said nuisance and the destruction of said building, structure or part thereof, herein provided, found and determined to be a nuisance.

(b) Reoccupation. The structure, building or part thereof vacated hereunder shall not be reoccupied without the written permission of the Director of Public Health, but such permission must be granted when within the time allowed as hereinbefore specified the alterations and repairs required to be made by the Director of Public Health shall have been made.

(c) Lien for Costs. Upon the written application therefor of the Director of Public Health, the Board of Supervisors shall allow and order paid out of such fund as the Board of Supervisors may lawfully specify any sums the expenditure of which may be necessary for the enforcement of Sections 596 to 600, inclusive, of this Article, and the Controller shall audit and the Treasurer shall pay such sums so allowed and ordered paid, and the amount so expended shall become a lien upon the property upon which said nuisance was abated in accordance with the provisions of Sections 596 to 600, inclusive of this

Article. And said amount may be recovered by an action against said property or the owner thereof.

"Sec. 600. Penalty. Any person, firm or corporation, or their agents, violating any of the provisions of Sections 596 to 599, inclusive, of this Article, or failing to comply with any direction or order of the Director of Public Health given pursuant to the provisions of Sections 596 to 599, inclusive, of this Article, by the Director of Public Health or any other agent of said Director of Public Health, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than Twenty-Five (\$25.00) Dollars nor more than Two Hundred and Fifty (\$250.00) Dollars, or by imprisonment in the County Jail for a period of not less than ten (10) days nor more than three (3) months, or by both such fine and imprisonment."

**PORTIONS OF THE ANNUAL REPORT; THE SAN FRANCISCO
WORKABLE PROGRAM FOR COMMUNITY IMPROVEMENT
1966**

City and County of San Francisco, California

Form of Government:

Combined City and County—Mayor (Executive)

Board of Supervisors—(legislative)

Principal Sources of Employment: Diversified—services, government, manufacturing, retail trade, finance-insurance-real estate, transportation-utilities, whole-sale trade

Population:

1950 Census	1960 Census	Current, Estimate
775,357	740,316	750,500 (July 1, 1965)
		(Calif. Dept. of Finance)

Housing—1960 Census:

Total No. of Housing Units	310,559
Total No. Substandard and Deficient Units	57,677
—Dilapidated Units	5,321
—Deteriorating Units	25,275
—Sound Units Lacking Some or all plumbing facilities	27,081*

This Program Submission was Approved by the Governing Body of the Community on: February 18, 1966
By Such Approval, the Governing Body Confirms its Obligation to use its Authority and Local Public and Private Resources in an Effective Plan of Action to Eliminate and Prevent Slums and Blight and to Submit an Annual Report of Progress to the Administrator of the Housing and Home Finance Agency.

Name and Title of the Official Responsible for Preparing This Submission and for Coordinating the Program:

John F. Shelley, Mayor
through

John H. Anderson, Urban Renewal Coordinator

The following programs of the Housing and Home Finance Agency are Being Utilized in the Community.

Federal Housing Administration loan insurance—
section 220,221(d)(3), housing for elderly; Public

*As defined by U. S. Bureau of Census.

Housing Administration—loans and contributions for low-rent housing; Community Facilities Administration—college housing loans, housing for elderly loans; Urban Renewal Administration—project loans and grants, Community Renewal Program grant, housing demonstration grant; Planning grant for metropolitan area plan (to Association of Bay Area Governments); Federal National Mortgage Association mortgage commitments; Voluntary Home Mortgage Credit Program assistance; Office of the Administrator—mass transportation demonstration grant (to Bay Area Rapid Transit District); Open Space Land Program.

The Community Plans to Utilize the Following HHFA Programs:

Same as above, plus: FHA loan insurance, especially rehabilitation loans, rent supplements, and other programs of the 1965 Housing Act; Urban Renewal Administration—General Neighborhood Renewal Plan; Open Space Land Program, possible Urban Renewal Demonstration Grant, other provisions of the 1965 Housing Act; Community Facilities Administration—possible use of Public Works Planning Advances; Beautification Program grants; Office of the Administrator—Mass Transportation Capital Improvement Grants.

I—CODES AND ORDINANCES

Objective: The adoption of, and compliance with, adequate standards of health, sanitation, and safety under a comprehensive system of codes and ordinances which set the minimum conditions under which dwellings may lawfully be occupied.

A. Codes Essential to Community Improvement Objectives:

Kind of Code Date Adopted

Building	May	1956	(major amendments made in August, 1964)
Plumbing	May	1955	
Electrical	March	1951	(minor amendments only) (recent major amendments include height limits, and changes in standards of certain residential and commercial zones; sign control)
Housing	July	1958	
Zoning	May	1960	
Fire	Feb.	1965	

San Francisco has not adopted "model codes" as such. These national standards are studied and their provisions, or often more restrictive provisions, are adopted into codes designed to fit the San Francisco situation in regard to such characteristics as density, fire hazards, fire protection and earthquake dangers.

B. Goals for Adoption of Codes Set Forth in the Last Program Submission:

Since San Francisco has a full set of modern codes controlling building, housing, and related areas, there were no goals for the adoption of new codes in the last submission. Codes are being kept

up to date. Discussion of recent amendments and the amendment process follow in later sections.

C. Committees Established for Continuing Review of Codes:

In San Francisco, code formulation and amendments go through extensive review by industrial, professional and community service organizations as well as by all concerned departments of the City government as represented on the Code Enforcement Sub-committee of the Inter-Agency Committee on Urban Renewal.

The procedures established for code review have been detailed in previous submissions of the Workable Program for Urban Renewal. Since few proposed amendments to the Building and Housing Codes have been formulated during the past year, they have been referred to the committee members directly interested.

D. Schedule for the Periodic Review and Up-Dating of Codes:

Kind of Code	Code Under Review Since Last Submission		Schedule Date Next Review to Be Completed
	YES	NO	
Building	X		December 1967 ¹
Plumbing	X		July 1966 ²
Electrical	X		December 1967 ²
Housing	X		July 1966
Zoning (See Section II—Community Planning)			
Fire		X	

¹Mandatory review every three years.

²When amended, Plumbing and Electrical Codes will provide for mandatory review every three years after regular changes are made every three years in model codes.

E. Has the Community Met the Goals for Code Review Set Forth in its Last Submission?

Not completely. (See below)

Progress Made: Although 60% of the first draft of the Plumbing Code has been completed, completion of the review and revision of this Code has been delayed because of the diversion of staff time to the review of the Electrical Code which is in greater need of revision. An Electrical Code Committee has been formed to write a single code combining portions of the National Electrical Code, State of California Safety Orders, and requirements desired by this Bureau. The members of this committee are representatives of utility companies, unions, contractors, professional engineers and architects, electrical equipment manufacturers, and City staff. The committee is served by a professional engineering consultant who is drafting the code. The combining of Federal, State and local codes has been accomplished by only one or two cities in the country. The process is long and tedious. The reviewing committee, meeting an average of four hours each week, does not expect to complete the writing of the code until late 1967.

F. Codes in Effect, Personnel Involved:

Kind of Code	Department Responsible For Administration & Enforcement	No. of Personnel (No. of Field Inspectors are listed in parenthesis) ^a	
		1964-65	1965-66
Zoning	Dept. of City Planning Zoning Division	17 (1)	17 (1)
Building	Dept. of Pub. Works, Bur. of Building Inspection	45 (30)	45 (30)
Plumbing	Dept. of Pub. Works, Bur. of Building Inspection	12 (9)	12 (9)
Electrical	Dept. of Pub. Works, Bur. of Building Inspection	21 (18)	21 (18)
Housing (Report of Record)	Dept. of Public Works, Bur. of Building Inspection	4 (0)	4 (0)
(Planned Area)	Dept. of Pub. Works, Bur. of Building Inspection	11 (9)	11 (9)
(Complaint)	Dept. of Pub. Works, Bur. of Building Inspection	6 (4)	6 (4)
(Annual & Complaint)	Dept. of Pub. Health, Bur. of Sanitation & Housing Insp. ^b	74 (50)	74 (50)
(Housing & Fire Codes)	Fire Dept. Div. of Fire Prevention & Investigation	32 (20)	32 (20)

Notes: ^aField Inspectors (listed in parentheses) include only those personnel who spend more than 25% of their time in the field. In a few cases this includes immediate supervisors of the Inspectors.

^bIn the Bureau of Sanitation and Housing Inspection, one Inspector spends 100% and one spends 80% of his time; 45 Inspectors spend 39% of their time on Housing Code work for the Bureau; 3 spend 100% on Housing Code work for the Urban Renewal Division; Bureau of Building Inspection, Department of Public Works. The remaining personnel includes 7 Inspectors who spend no time in Housing Code work; 9 supervisory and 8 clerical personnel, each spending 20% of his time on Housing Code Work.

G. Code Administration

Changes in Comprehensive Program:

The City-sponsored Conservation Program is being carried out on a building-by-building basis in ten areas designated by the Chief Administrative Officer on the recommendation of the Director of City Planning. Procedures have been explained in previous Workable Programs. As reported in previous Workable Programs, public meetings to explain the conservation program were held in the Glen Park, Great Highway and Visitacion Valley districts. In May 1965 Buena Vista Heights was designated a Conservation Area. A public meeting attended by over 200 people was sponsored by neighborhood organizations.

	<u>Date Designated</u>	<u>Total Buildings Estimated</u>	<u>Buildings Inspected</u>	<u>Violations Detected</u>	<u>Buildings Brought Into Compliance</u>
Pacific Heights (Areas 1 thru 5)	Nov. 1959 through Apr. 1961	1852	1801	1514	1109
Visitacion Valley	Oct. 1960	2140	1938	1223	1145
Glen Park	Nov. 1962	1214	349	269	190
West Nob Hill	Nov. 1962	949	459	405	253
Great Highway	Nov. 1962	1255	185	131	96
Buena Vista Heights	May 1965	416	24	21	0
Total Buildings		7826	4756	3563	2793
Total Dwelling Units		19,518	17,092	13,133	7942

Alteration permits issued in these areas during the past year averaged \$148,275 a month for a total of \$1,779,300. It is estimated that 55% of the \$6,305,841 worth of permit work in all areas was above Code requirements.

In West Nob Hill, alteration permits issued since the program began there 33 months ago average \$40,800 per month which is four times the average value in the five years preceding designation of the area.

Conservation Area One (Pacific Heights) was de-designated by the Chief Administrative Officer on July 1, 1964 after $4\frac{1}{2}$ years during which time approximately \$500,000 was spent by the property owners to improve the properties within the area. Only 45% of this amount was required to comply with Codes, averaging \$160 per dwelling unit. The appearance of the area was improved by the removal of overhead wires and the planting of trees along Sacramento Street. Similar improvements were made in the other conservation areas. Conservation Area Two was de-designated on March 1, 1965, and Conservation Area Three was de-designated on July 1, 1965.

Other code enforcement programs are discussed in Section H.2, following.

Plans for improving Comprehensive Program:

An application is nearing completion for submission to the Board of Supervisors requesting a grant to carry out a federally assisted conservation program to augment the City's present program.

Moves toward consolidation of code enforcement activities were made in several directions. By mutual agreement of all agencies concerned, the Health Department no longer checks applications for new buildings. Also, by mutual agreement, the Dept. of City Planning no longer checks permits for alteration work unless a question of zoning is involved. This latter arrangement has reduced by approximately 50% the number of alteration permits processed through the Department of City Planning. Within each of the reviewing agencies procedures have been initiated which further reduce the amount of time required to process applications. These and other moves toward consolidation resulted from the concerted efforts of City departments and civic and professional groups to effect a physical and administrative consolidation of code enforcement activities. A program for consolidation was presented to the Board of Supervisors by the Chief Administrative Officer in 1965. Action by the Board was delayed because of the fear expressed by members of building trades unions, builders, architects, and others, that consolidation would create more red tape and delay. Also the City Fire Department opposed a proposed Charter amendment redefining the powers and duties of the Fire Department vis-a-vis code enforcement, which was recommended by the Chief Administrative Officer as necessary for the proposed consolidation.

The Chief Administrative Officer, or his representative, is meeting regularly via the Chamber of Commerce with the opposing groups to see if an acceptable plan for consolidation can be worked out. Many of the points of disagreement have been discussed and some have been resolved. It is anticipated now that the proposal for consolidation can be resubmitted to the Board of Supervisors before November, 1966, and favorable action is anticipated.

H. Data on Code Enforcement Activity: July 1, 1964 to June 30, 1965

	Bldg. Code	Plmbg. Code	Elec. Code	DPW Urban Renewal	Housing Code		Total
					DPW Compl.	DPH Annual	
Permits Issued	13507	20728	15768	NA	NA	NA	NA
Inspection Trips	50844	30030	44693	15591	2447	50014	68052
Buildings Inspected	NR	NR	NR	524	173	16053	15760
Violation Notices Issued	2578	982	4006	400	151	391	942
Violation Notices Satisfied	2578	822	3990	806	143	615	1564
Violations Being Corrected	NA ^a	878	NR	781 ^b	192 ^b	1343 ^b	2316 ^b
Stop Orders Issued ^a	NR	NA	NR	NR	NR	23	23
Certificates of Completion	NR	NR	NR	NA	NA	NA	NA

Notes: NA means Not Applicable.

NR means Not Recorded.

^aHousing Code data includes only Condemnation or Abatement Orders of the Department Directors.

^bEstimate of number of application for permits to correct violations.

H. 3 HOUSING CODE ENFORCEMENTS

	DPW No. of Structures			No. of Dwelling Units		
	DPW Conser- vation	DPW Com- plaint	DPH Annual	DPW Conser- vation	DPW Com- plaint	DPH Annual
	Total	Total	Total	Total	Total	Total
Inspected during past 12 mos.	524	151	16053	1910	768	160530*
Found in noncompliance with Housing Code during past 12 mos.	400	149	391	1640	483	3910*
Noncompliance carryover from prior inspections	1382	414	2865	5828	1244*	28650*
Total requiring compliance action	1782	563	3256	7468	1727	32560
Brought into compliance during past 12 mos.	773	148	595	2792	425	4301
Razed or otherwise eliminated during past 12 mos.	33	86	20	195 ^b	312	876
Total compliance action completed	806	234	615	2987	737	5177
Remaining in noncompliance at end of past 12 mos.	976	329	2641	4481	990*	27383
Estimated number to be brought into compliance during coming year	1000	300	600	2500	1000	6000
Notes: *Estimate						

^bIncludes rooming units and a few vacant units

*The rate of inspections during the coming year may be slowed down for a few weeks during the training period needed to effectuate departmental consolidation

H. 4 HOUSING CODE APPEALS:

Number filed with Appeals Board 63
 Number resolved by Appeals Board 113*
 Number filed with Courts 148
 Number resolved by the Courts 95

The governing body, the Board of Supervisors, does not have review power of individual cases under the Housing Code.

*Number representing cases which have been appealed

VII—CITIZEN PARTICIPATION

●Objective: Community-wide participation on the part of individuals and representative citizens' organizations which will provide, both in the community generally and in selected areas, the understanding and support necessary to accomplish community goals.

A. Name and Title of the Official Responsible for Assuring Citizen Participation in All Workable Program Activities.

The Mayor, through his Urban Renewal Coordinator, is responsible for citizen participation. The San Francisco Planning and Urban Renewal Association (SPUR) is the citizen group officially responsible for the involvement of citizen participation in the Workable Program for Community Improvement, and is charged with advising on planning, housing and development matters after objective citizen investigation. The Human Rights Commission has been directed by the Mayor to serve as a special committee on minority housing problems and to advise on the subject of equal opportunity in housing and matters related thereto.

B. Advisory Committee Meetings Held During the Past Year:

SPUR is a private, non-profit, non-partisan corporation. Its Executive Board meets at least once a month. Numerous study committees meet continually throughout the year, with at least two committees meeting each week. A special 80-man

citizens' advisory committee was formed to follow the development of the Community Renewal Program, and met at least six times during the year. The Human Rights Commission, an official government agency, meets regularly as a full commission at least twice a month, and has numerous public hearings.

C. Changes in Membership of Citizens Advisory Committee Since the Last Submission:

SPUR's membership is open to anyone in the city or region. This year's membership has increased to 868, compared with 713 last year, and approximately 250 in 1959. New Board members include neighborhood and minority leaders. At least four neighborhood associations joined as organization members. The membership of the Human Rights Commission is described in Section H-1 and in the supplementary material list. The members of the citizens' advisory committee of the Human Rights Commission is also included in the supplementary material (Annual Report, HRC).

D. Specific Activities Undertaken by the Citizens Advisory Committee During the Past Year:

As an on-going organization, SPUR has continued its usual program of scheduling weekly and monthly meetings for study committees, ad hoc working committees, and for general membership. In addition to the Newsletter, which features special issues, SPUR publishes a monthly bulletin to keep members informed of

day to day activities, special reports on current issues and independent reports by committees. Because of the passage of Proposition 14 in November, 1964, which nullified fair housing laws in California, there was less than usual emphasis on redevelopment during the past year; however, SPUR kept in close touch with the Redevelopment Agency's on-going programs. Some of SPUR's more specific activities are listed as follows:

- * SPUR formed a joint Regional Planning and Housing Committee to investigate the regional implications of housing.
- * SPUR worked intensively over a period of a year with the Haight-Ashbury Neighborhood Council to encourage the undertaking of "grass roots" neighborhood plan. SPUR worked out arrangements with the University of California Medical Center to contribute funds in the amount of \$15,000, with matching funds by SPUR, to undertake such a plan. Unfortunately, the offer was rejected for lack of support by the neighborhood.
- * SPUR worked with the Arguello Park Community to complete the Arguello Neighborhood Park, the first of its kind in the city. It was built by the citizens themselves with private contributions.
- * SPUR worked with the Upper Market Planning Association to encourage the undertaking

of a "grass roots" neighborhood plan. The board of directors of the Association has been formed of representatives from the entire area and includes at least five residents of local improvement associations. With the assistance of the San Francisco Foundation; SPUR gave a grant to the Upper Market Planning Association in the amount of \$8,000 to begin a neighborhood improvement plan. The Association chose a planning consultant and the work is underway.

- * SPUR continued to urge the Mayor to make an appointment of a high-level coordinator of housing, planning and development in line with its recommendation of 1963, which was further amplified by the Community Renewal Program report. The Mayor sought the advice of SPUR regarding specific candidates for the appointment.
- * SPUR played a major role in the formation of the Bay Development and Conservation Commission, a State agency for control and regulation of bay fill. Two SPUR members were appointed to the Commission and SPUR's associate director was chosen as director of the Commission.
- * The executive director of SPUR has been asked to serve on numerous citizen advisory committees in San Francisco and throughout the Bay Area regarding housing and trans-

portation, such as the Bay Area Transportation Study, the Community Renewal Program, the Market Street Task Force, etc.

- * SPUR continued to play an active role in the Market Street Planning Project.
- * SPUR issued a number of specific reports on the city's transportation problems, urging the formation of a special transportation commission, authority or department.
- * SPUR held a successful workshop on the planning of spectator sports facilities.
- * SPUR proposed a South-of-Market campus for the University of California.

E. Specific Program Activities of the Citizens Advisory Committee to be Undertaken During the Coming Year.

In accordance with its policy of follow-through, most of the activities listed above will be continued during 1966. SPUR will give careful consideration to reorganization that would continue to give greater emphasis to neighborhood improvement work.

SPUR will make a careful analysis of the final report on the Community Renewal Program and will continue to review city actions as they relate to the Community Renewal Program recommendations.

SPUR is giving increased emphasis to the problem of low-cost housing now that the Public

Housing Authority's development program is underway and, particularly because of the new tools made available in the 1965 Housing Act. In the early part of 1966, SPUR anticipates holding a high-level workshop on housing.

SPUR will give consideration to a workshop on the relationship of city planning to school planning.

It is SPUR's intention to sponsor a special "San Francisco Week", giving attention to the important areas of city planning and development, in an effort to bring city-wide interest to city planning.

- F. Subcommittees of the Citizens Advisory Committee Established to Work on Special Problems Such as Equal Opportunity for Housing, Neighborhood Participation, Code Compliance, Relocation Housing, Public Information, Capital Improvement Program, etc.

Minority Housing: As mentioned in item B, the Human Rights Commission was formed and officially assigned the responsibility of advising on the problems of equal opportunity for housing and minority problems in relocation housing. (See H.1.)

Spur Committees:

Executive Committee: A 20-man executive committee, which meets at least once a month, is the action committee of SPUR. This committee

handles all administrative and policy matters as recommended or referred to it by standing study committees or ad hoc committees. SPUR has four study committees with memberships running from 150 to 250 each. These committees, which meet once each month, are City Planning, Housing, Transportation and Regional Planning. Notices of these committee meetings are sent to the entire membership with an approximate attendance between 35 and 50 persons regularly. These meetings are also open to the public and most often include public officials from the City and County of San Francisco.

Special Committees: SPUR organizes ad hoc or work committees. In the past these have included Governmental Organization, Planning Department, Budget, Low Cost Housing, Regional Transportation, Code Enforcement and Organization, Board of Permit Appeals, South-of-Market Redevelopment, Capital Improvement Program, and others.

Codes: The Chamber of Commerce has a Code Committee which meets regularly to review code changes. A code advisor from SPUR is a member of this committee.

G. Staff Assistance for Citizens Committee:

SPUR staff consists of the executive director and an assistant director, with three clerical positions. SPUR was not able to add a full time neighbor-

hood worker to the staff during the past year but hopes to do so in 1966.

H.1. Membership of the Subcommittee of the Citizens Advisory Committee on Minority Group Housing. In January, 1965, Mayor Shelley assigned the Human Rights Commission the role of advisor to the City government on matters of equal opportunity in housing and urban development.

The Human Rights Commission was established by ordinance on July 13, 1964. The following excerpt from that ordinance is the declaration of policy for the Human Rights Commission:

It is hereby declared that the policy of the City and County of San Francisco is to act to give effect to the rights of every inhabitant of the City and County to equal economic, political and educational opportunity, to equal accommodations in all business establishments in the City and County and to equal service and protection by public agencies; that an instrumentality should be established to give effect to such rights, to eliminate prejudice and discrimination because of race, religion, color, ancestry or place of birth, to inform the inhabitants of the City and County of developments in human relations, to provide expert advice and assistance to the officers, agencies, boards, departments and employees of the City and County in undertaking ameliorative practices to keep peace and good order and to officially

encourage private persons and groups to promote and provide equal opportunity for and good will toward all people.

The Human Rights Commission has a membership of 15 which is representative of diverse race, color, religion and ancestry. The Commission is assisted by an Advisory Council of 40 members, 2 public relations consultants, and a staff of 4, including a Director, a Community Organization Representative, a Human Relations Analyst, and an Employment Representative. A Housing Specialist will be employed in 1966.

A complete listing of the membership of the Human Rights Commission and the major activities of the Commission to date are continued in the supplementary material. (First Annual Report of the Human Rights Commission, September 1965.)

I. Citizen Participation Programs Carried Out or Planned for Neighborhoods or Areas to be Directly Affected by Clearance, Systematic Code Compliance, Conservation, etc.

When areas of neighborhoods are scheduled for code enforcement programs, SPUR confers with the head of the Urban Renewal Division of the Department of Public Works, prior to the designation of such area. The executive director of SPUR joins city officials in making presentations before neighborhood groups to explain plans and proposals and citizen rights in neighborhood code

enforcement programs. SPUR offers its assistance to any neighborhood which is contemplating renewal or code treatment of any kind, to devise its own plans and programs or to analyze those which are being prepared for its neighborhood by the City. SPUR offers both its staff and citizen members to act as go-betweens and third party members of any meetings or deliberations between the neighborhood and the City.

The Economic Opportunity Council:

The Economic Opportunity Council was appointed by Mayor Shelley in September, 1964, to formulate a community action program under Public Law 88-542.

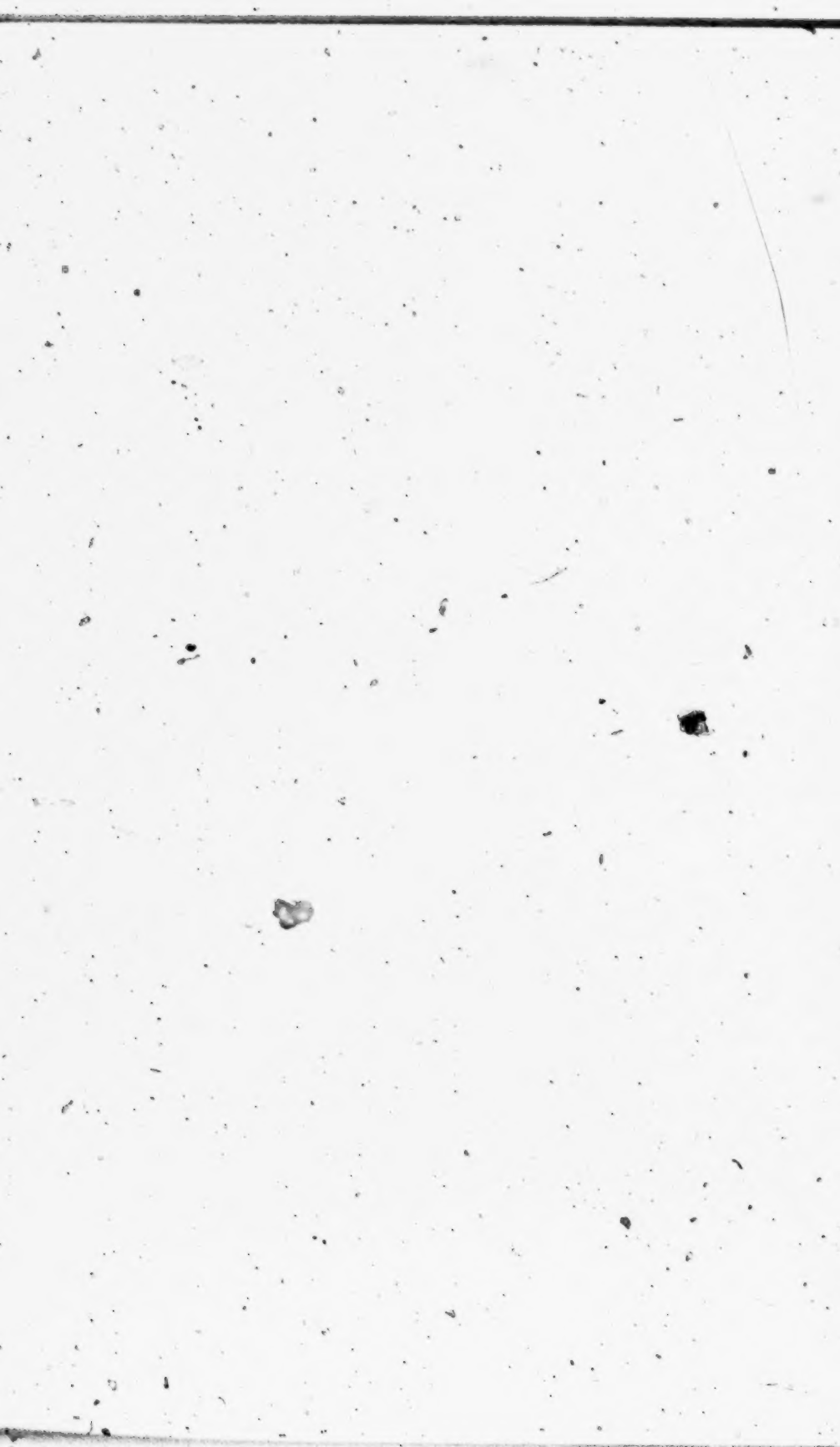
Initially, four "pockets of poverty" were identified in which more than one-third of the families were earning less than \$4,000 per year: Western Addition, Hunters Point, Chinatown and Inner Mission. Through recent studies, four additional areas have been considered for inclusion in the program.

Two of the target areas are within urban renewal areas: (1) the Western Addition where construction in the Western Addition Area 1 is nearing completion and where plans for development of another 72 blocks designated as Western Addition Area 2 have been completed and approved, but execution is delayed as a result of the passage of Proposition 14; (2) Hunters Point where the Redevelopment Agency had been asked by the

Board of Supervisors to make a study which would lead to a plan for development of the area now occupied by residents of temporary war housing which was scheduled to be demolished by 1970.

STATISTICS: HOME FIRE SAFETY PROGRAM

<u>Inspections</u>	<u>1963-1964</u>	<u>1964-1965</u>	<u>1965-1966</u>
Total homes contacted	39,701	25,581	33,167
Total homes admitted	16,448	10,120	13,036
Total "not home"	20,365	13,541	17,695
Total "declined"	2,888	1,920	2,436
 <u>Common Hazards Detected</u>			
Smoking—matches	209	163	113
Electricity	1,567	926	1,014
Flammable liquids	651	378	444
Stoves—heating	483	281	294
Rubbish—storage	2,951	1,745	2,226
Miscellaneous	984	599	848





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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 92

ROLAND CAMARA,

Appellant,

VS.

MUNICIPAL COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO,

Appellee.

On Appeal from the Judgment of the Court of Appeal,
State of California, First Appellate Division

APPELLANT'S REPLY BRIEF

INTRODUCTION

This brief replies both to the brief of appellee and to the *amici curiae* brief submitted by the National Institute of Municipal Law Officers. These briefs have attempted to shift the focus of this case from an analysis of the protections of the Fourth and Fourteenth Amendments to an *in terrorem* defense of legislative programs of public health and urban renewal.

Such a shift in emphasis confuses the question at issue here and distorts the true effect of a warrant procedure in a health inspection. We are concerned with basic constitutional rights; to say that the progress of civilization in fighting disease and sub-standard living conditions will be halted unless these rights are found not to exist, is to exalt expediency over the human values upon which our government rests.

Appellee and *amici* aggregate several dissimilar problems in seeking to free the health inspector from constitutional standards. *Amici* rely upon the spectre of an urban population in *present* danger of fire or disease from such hazards as garbage accumulation and faulty electrical systems. Appellee's brief goes much further without warning us as to how far the argument—and the immunity from usual safeguards—goes. Under the San Francisco Municipal Code *all* residences may eventually be subject to inspection whether or not there is any reasonable ground to believe that the particular residence or residential area constitutes any danger whatsoever to the public health. (See App. Br. 44.) The so-called "planned area inspection" (one of the "routine inspection" often referred to) is authorized by the Code not only for presently blighted areas but also for the so-called "conservation area," which is defined to include "an area which is to be *protected from* blighting influences and *maintained* in a safe and sound state. . . ." (S. F. Mun. C. Ch. XII, sec. 203.3; R. 77, emphasis added.) In other words, the type of inspection for which appellee seeks immunity from probable cause

and warrant requirements extends not only into areas of present danger, but also into areas in which there is no such danger to the public. Ultimately, this means any residential area.¹

I

APPELLEE WOULD ALLOW HEALTH INSPECTIONS AN IMPROPER EXEMPTION FROM CONSTITUTIONAL CONTROL

"The search of a private dwelling without a warrant is, *in itself*, unreasonable and abhorrent to our laws." *Agnello v. United States*, 269 U.S. 20, 32, 70 L.ed. 145, 149 (1925) (emphasis added.) The pre-*Frank*² cases cited in appellant's brief (AOB 14-16) are not to be distinguished on the ground that they do not concern health inspectors. Indeed, they do not mention health inspectors. However, these cases show that in *varied* circumstances the courts have been scrupulous in upholding the security protected under the Fourth Amendment by requiring the searching officer to have a warrant except under circumstances amounting to necessity. Short of *Frank*, nothing in our constitutional history grants a peculiar immunity from this requirement to the health inspector.

Appellee seeks to transform the *Frank* decision from one resting on a constitutionally unsupportable

¹Not involved in this case, and conceded to be proper subjects for inspection without warrant, are (1) new construction, (2) repairs done under a building permit, and (3) the common areas of multiple residences such as hallways and fire escapes.

²*Frank v. Maryland*, 359 U.S. 360, 3 L.ed.2d 877 (1959).

premise to one in which the Court "merely" reached a balance of conflicting constitutional claims. It is begging the question when appellee in its brief characterizes the *Frank* decision as one which "recognizes a general right to be secure from unreasonable official intrusion into personal privacy. The Court holds only that this right of privacy is subject to the public welfare in the circumstances before it." (App. Br. 20.) The *Frank* decision obliterated the "general right" to constitutional protection "in the circumstances before it" by relying on a doctrine that the protections of the Fourth Amendment apply only in those circumstances wherein the search was to obtain incriminating evidence. *Frank v. Maryland*, 359 U.S. 360, 365-66, 3 L.ed.2d 877, 881-82 (1959).

Now, at this late date, appellee appears to assert that *Frank* should at least be extended beyond protecting Fifth Amendment rights to mean that the Fourth Amendment offers protection of any *other* constitutional right such as those present in the First Amendment. Appellee, whether wittingly or not, urges the same doctrine as *Frank*, though on a broader scale. Appellee significantly states (App. Br. 29):

"The Fourth Amendment does, of course, protect these rights; the First and Fifth Amendments compel this result."

Appellee is wrong. It is the Fourth Amendment which compels this result, independently of the First or Fifth Amendments. There is scant basis upon which to conclude—as did *Frank* and as now does appellee—that the Fourth Amendment is a procedural

constitutional right designed only to protect substantive rights appearing in other provisions of the Constitution. The Fourth Amendment was intended to have and does have constitutional content in and of itself. "It [the law of searches and seizures] reflects a dual purpose—protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him." *Davis v. United States*, 328 U.S. 582, 587, 90 L.ed. 1453, 1457 (1946.)

Appellee places great reliance upon what is described as a pragmatic test of "reasonableness" under the Fourth Amendment used in *United States v. Rabinowitz*, 339 U.S. 56, 94 L.ed. 653 (1950).

We believe that all the opinions in *Rabinowitz* are important to recall in interpreting the Fourth Amendment. Would that the following passages had been recalled when the decision in *Frank v. Maryland* was written:

"It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in *Boyd v. United States* [other citations omitted] . . . or one approaches it as a provision dealing with a formality. It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.

* * *

"When the Fourth Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant justifies it, barring only exceptions justified by absolute necessity."

* * *

"With only rare deviations, such as today's decision, this Court has construed the Fourth Amendment 'liberally to safeguard the right of privacy.'"³

Appellee alludes to, but does not produce, a "long history of warrantless health inspections." (App. Br. 36.) Certainly the majority opinion in *Frank* does not present such a history since the examples there deal primarily with "statutes allowing inspection to enforce standards for the manufacture or shipping of various items of trade." *Frank v. Maryland*, 359 U.S. 360, 368, 3 L.ed.2d 877, 833, fn. 5 (1959). The opinion does manage to isolate a colonial Pennsylvania statute, an Eighteenth Century Maryland law, and the Baltimore ordinance under scrutiny in the case itself. Even the existence of such a history would not be determinative. "[A] power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the Constitution was designed to guard against. . . ." Cooley Constitutional Law 71 (1st ed. 1868).

³*United States v. Rabinowitz*, 339 U.S. 56, 69, 70, 74, 94 L.ed. 653, 662, 664 (1950) (Frankfurter, J., dissent) (emphasis added).

As for the several state decisions which appellee cites as reflecting a general judicial trend favoring the result in *Frank v. Maryland* (App. Br. 38-40), suffice it to say that the bulk of these decisions arose after *Frank* and were directly encouraged by *Frank*.

Nor can the asserted immunity of health inspections from constitutional restraints be justified by a detailed statement as to how the purposes and procedures of a health inspection differ from those of a criminal search. All types of searches will have differences among themselves to varying degrees. There is nothing *sui generis* about a health inspection. A search for fugitives may take on the character of an inspection and yet run athwart Fourth Amendment protections. See *Lankford v. Gelston*, 363 F.2d 197 (4th Cir. 1966), where an injunction was issued against such a search. All searches of the home have at least one thing in common: They intrude upon the security of one's home. While at times the intrusion may be necessary, it is clearly unreasonable where—except in the circumstance of necessity—the decision as to whether that intrusion should be made or not is determined by the person making or otherwise responsible for the search. The essence of a warrant procedure is that it inserts the impartial judge into a position to protect against that determination being arbitrary or without probable cause. See *Johnson v. United States*, 333 U.S. 10, 13-14, 92 L.ed. 436, 440 (1948); *McDonald v. United States*, 335 U.S. 451, 455-56, 93 L.ed. 153, 158 (1948); *Stanford v. Texas*, 379 U.S. 476, 485, 13 L.ed.2d 431, 437 (1965).

II

A REASONABLE SEARCH WARRANT PROCEDURE WILL NOT INHIBIT PUBLIC HEALTH PROGRAMS OR URBAN RENEWAL.

The briefs of appellee and *amici* concentrate on the problems of urban congestion, property depreciation and sub-standard housing conditions. These briefs bolster their positions by claiming that a system requiring warrants would place federal, state and local programs designed to meet urban problems in total jeopardy. In reality, the briefs merely justify these programs. However, the issue in this case is not whether public health programs or urban renewal can be justified.

Certainly there is nothing in the federal Housing Act in its requirement of a "workable program . . . to eliminate, and prevent the development or spread of, slums and urban blight" (42 U.S.C. sec. 1451(c) (Supp. I, 1965)), that commands that a "workable program" cannot include a reasonable search warrant procedure. Certainly there is nothing in the purpose of the San Francisco Housing Code "to provide minimum requirements for the protection of life, limb, health, property, safety and welfare of the general public and the owners and occupants of residential buildings" (S.F. Mun. C., Ch. XII, sec. 103; R. 76) that requires that these goals be reached without affording occupants the constitutional protections of a search warrant.

It is true that there are real problems present in protecting the public health. These problems are here today and have not been solved by the present system,

which permits searches without warrants. We agree with appellee in quoting the following (App. Br. 13):

"Without question, the failure to enact, improve, *soundly administer, and effectively enforce adequate* local codes, more than any other single cause, accounts for the huge tasks of the present urban renewal effort. * * *" (Emphasis added.)

Given an adequate local code, *the lack of enforcement*, whether through financial limitations or administrative inaction, is the real cause for urban blight. If the New York grand jury investigation, so prominent in the briefs, offers "the compelling reason" (App. Br. 11) justifying appellee's position, then this example illustrates the basic fallacy in this position. All it shows is a failure to enforce the law, remedied by a special grand jury inspection team. The example does not show that the power to force searches without warrants was necessary to uncover the violations.

There is no justification in appellee's characterization of a warrant procedure as a "fixed formula" (App. Br. 8, 21) which would stifle programs of public health and urban renewal. Certainly we require a warrant. What remains "unfixed" is whether particular facts are sufficient to constitute a probable cause to obtain a warrant for a health inspection. This is not the case to determine whether probable cause existed for a search warrant since no search warrant was applied for. However, "probable cause" in a health inspection situation need not require the same type of showing as required in a criminal matter. For example, observations of the inspector both as to the

home involved and the immediately surrounding homes may show probable cause. Ultimate, however, is the necessity that there be some meaningful judicial check upon the administrator's power to force a search. Moreover, there is no demonstration that the requirement of a warrant even on a house-to-house basis will so restrict the routine inspection or other administration search as to destroy programs of public health and urban renewal. If, as the *amici* admit, "the overwhelming majority of building and home owners feel their interests lie in permitting such inspections, and welcome the periodic visits of municipal inspectors" (A.C. Br. 15), most of appellee's concern seems groundless. Only one example has been presented to the contrary. Appellee notes that over a three-year period a certain number of instances arose wherein the residents of San Francisco declined voluntarily to allow a fire inspector into their homes. (App. Br. 48-49.) However, nothing can be concluded from such raw figures.⁴ The figures do indicate a certain value which citizens place on privacy from official intrusion without cause or complaint.

In short, the main thrust of the briefs opposing appellant has been to cloud the issue by placing the basis of their opposition to the use of search warrants upon the justification of programs of public health and urban renewal. We all admit the importance of these programs. The problems they attempt to meet

⁴We do know, however, that the inspections were not considered very important because no follow-up was made on the refusals. We also know that the ordinance was recently amended to require consent for such inspections. (See App. Br. 48, note.)

have been with us for many years, years in which a warrant procedure was not required. It has become apparent that the lack of adequate codes and enforcement is the real difficulty which has faced us and continues to face us. There is nothing which demonstrates that a probable cause and warrant procedure must inhibit the proper enforcement of housing standards.⁵

III

A SCHEME ALLOWING HEALTH INSPECTIONS WITHOUT WARRANTS DOES NOT GIVE PROTECTION EQUAL TO A SYSTEM WHICH REQUIRES SEARCH WARRANTS.

It was only natural that appellee would assure us that the security of one's home receives from the present system "substantially equivalent protection against arbitrary inspections" as from a system requiring a warrant. (App. Br. 40.)

Appellee argues, for example, that were the health inspector to appear with a search warrant in hand at the door, he could force immediate entry. He could not be required to return at a more convenient time. (App. Br. 24.) However, we submit that the mere appearance of a government inspector, armed with the ready reply, "The law doesn't require me to have a search warrant," will have an equally successful effect upon a substantial number of persons. More-

⁵Appellee's comment that there is no provision for the issuance of search warrants for health inspections in either the city ordinances or state law (App. Br. 4) is obviously irrelevant. Should this Court require a search warrant, it is equally obvious that legislative means are at hand to supply the omission.

over, there is nothing that requires that the standards and procedural steps of the San Francisco ordinance and actual practice as outlined by appellee (App. Br. 43, 44-47) will be lost by the institution of a search warrant procedure. If the San Francisco ordinance is designed and enforced with due regard to the concern of individuals, we see no reason to suppose that the addition of a reasonable search warrant procedure would cause the Board of Supervisors to remove the present protections, or change the practice of seeking a convenient time for the search. Indeed, it may be that constitutionally they may not. Reasonable notice and reasonable time may be required portions of search warrant procedure where no emergency is involved.

Finally, the fact that section 503 of the Municipal Code requires as one of its standards that the inspection be "only when necessary for the performance of the duties" of the inspector is hardly an adequate substitute for the element of probable cause, as appellee urges. (App. Br. 43-44.) One is not hard put to imagine a police officer illegally forcing entry into a home in the necessary performance of his duty, at least in the mind of the officer. The point is that the standards and procedures provided in section 503 are irrelevant to the element of probable cause. These standards and procedures mainly determine only *how* the inspection is to take place. The question as to *whether* it should take place is characterized only in terms of the official carrying out his "duties." Nor does the present practice answer the question of which portions of the premises may be searched even if the entry is in per-

formance of duties. See *Trupiano v. United States*, 334 U.S. 699, 710, 92 L.ed. 1663, 1667 (1948). The inspector may well be carrying on his duties in performing a routine inspection under section 86 of the Municipal Code (R. 36-37) and yet in doing so violate a constitutional standard of conduct.

CONCLUSION

The constitutional protection of the security of one's home through the use of the search warrant applies to all invasions of the home by the government. The health inspection is not to be peculiarly immune. There is no justification for the argument that a reasonable search warrant procedure will inhibit either public health programs or urban renewal.

The San Francisco ordinances before the Court violate the constitutional protection of security of the person in his home. Therefore, it is respectfully submitted that the judgment of the Court below should be reversed.

Dated, San Francisco, California,

February 1, 1967.

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FEB 3 1967

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In the
Supreme Court of the United States

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CITY OF SEATTLE, *Appellee*.

On Appeal from the Supreme Court of the State of Washington

**BRIEF FOR THE COMMONWEALTH OF
MASSACHUSETTS, THE CITY OF MALDEN AND
THE MALDEN REDEVELOPMENT AUTHORITY,
AMICI CURIAE**

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**BRIEF FOR THE COMMONWEALTH OF
MASSACHUSETTS, THE CITY OF MALDEN AND
THE MALDEN REDEVELOPMENT AUTHORITY,
AMICI CURIAE**

Interest of Amici Curiae

This brief is filed pursuant to Rule 42(4) of the Rules of this Court by The Commonwealth of Massachusetts and two political subdivisions thereof: the City of Malden, a municipality located approximately five miles north of Boston, where some 56,000 people live within an area of 4.4 square miles; and the Malden Redevelopment Authority, a public body politic and corporate organized and existing pursuant to section 26QQ of chapter 121 of the Massachusetts General Laws (Ter. Ed.), which is administering Malden's extensive urban renewal program.¹ The City of Malden's code enforcement program, for which a federal grant of more than \$635,000 was recently approved² and which is fundamental to urban renewal in Malden, would be seriously impeded if the contentions of appellants in the cases at bar were sustained by this Court.

A challenge of the Malden code enforcement program and the procedure by which it is being carried out was rejected—and the validity of that program and procedure was upheld—in a recent decision of the Massachusetts Supreme Judicial Court. *Commonwealth v. Hadley*, 1966 Mass. Adv. Sh. 1359, decided December 2, 1966 (see pp. A-1—A-10, *infra*). That case has been appealed to this Court where it is numbered 1179 on the miscellaneous docket; and, inasmuch as the jurisdictional statement in the *Hadley* case was not filed until January 5, 1967, it seems

¹ Malden presently has, in various stages of development, four different urban renewal projects. Together, those four urban renewal project areas include 478 acres—about one-sixth of the total area of the City—and the aggregate of the gross project costs is more than \$28,000,000.

² The City is undertaking a code enforcement program pursuant to section 117 of title I of the Housing Act of 1949, as amended, at an estimated project cost of nearly one million dollars.

likely that this Court's decision in the cases at bar will greatly affect the outcome of the *Hadley* case.

The particular facts involved in the *Hadley* case, as stipulated (see pp. A-14 — A-15, *infra*), were as follows:³ Several years ago, the City of Malden undertook a systematic inspection of many houses in the City in order to discover the degree to which conditions likely to cause disease or fire were present in private houses.⁴ Mr. Hadley owned and occupied a single family dwelling in the City, and, in due course, there were addressed to Mr. Hadley repeated requests, both by mail and by telephone, that he make an appointment for the inspection of his house, at his convenience, by the City health inspectors. This attempted inspection was part of a general plan of administrative inspections: Mr. Hadley was in no way treated differently from his neighbors and other Malden residents. Nevertheless, Mr. Hadley refused to allow any inspection, and consequently he was charged with, and convicted of, violation of the Sanitary Code of the Massachusetts Department of Public Health (Art. I, Reg. 3.1)⁵ in that he "did wilfully impede or obstruct an inspection or examination by the Code Enforcement Inspector of the Board of Health" of the City of Malden.

Although the *Hadley* case and the cases at bar have a common subject matter and the factual context of the *Hadley* case is somewhat similar to that in *See* and particularly like that in *Camara*, there are important distinctions. In the *Hadley* case the question was whether the Fourth and Fourteenth Amendments to the Constitution forbid

³ The Supreme Judicial Court's opinion in the *Hadley* case appears in full as Appendix A to this Brief (pp. A-1—A-10, *infra*). The entire record upon which the *Hadley* case came before the Supreme Judicial Court is reprinted as Appendix B hereto (pp. A-11—A-17, *infra*).

⁴ For example, see Appendix C (p. A-18, *infra*), which contains statistics concerning code enforcement in Malden in 1965.

⁵ By statutory directive, the Department of Public Health is to

the imposition of a fifty-dollar fine for categorical refusal to allow inspection of a house, at a reasonable time convenient to the householder and to be established by prior appointment, when that inspection was in the course of an area-wide program of reasonable systematic inspections to learn of conditions dangerous to health and safety.

The Malden procedure embodies the maximum degree of accommodation to the householder's convenience. As the Supreme Judicial Court held, in construing the statutes involved, "the code contemplated that such an area inspection would proceed in an orderly manner (but, of course, without undue delay) and with due consideration for the interests and privacy of occupants. The enforcement inspector seems to have acted throughout with commendable respect for the defendant's privacy and convenience. Efforts to make an appointment for an inspection were continued patiently until the defendant unequivocally refused to cooperate at all." (1966 Mass. Adv. Sh. 1359, 1362; p. A-5, *infra*.) The requirement of the Malden procedure that inspection could take place only at a reasonable time and by appointment distinguishes it both from the Seattle ordinance, which contains no requirement that inspection be at reasonable times or on notice or by appointment and from the San Francisco ordinance, which contemplates the inspector's demanding admittance forthwith when he knocks on the door, although he is required to knock at a reasonable time.

The Massachusetts statute is also different in that it involves only a fifty-dollar fine for *willful* obstruction of

"take cognizance of the interests of life, health, comfort and convenience" of the citizens of The Commonwealth; to "conduct sanitary investigations and investigations as to the causes of disease, and especially of epidemics"; and to "disseminate such information relating thereto as it considers proper". Mass. Gen. Laws (Ter. Ed.) c. 111, § 5, as amended by Mass. Acts 1965, c. 898, approved Jan. 7, 1966.

inspection⁶ whereas in both the Seattle and the San Francisco ordinances refusal to permit entry is made a crime punishable by imprisonment—in the latter case, imprisonment up to six months—and willfulness does not appear to be, an element of the crime. Moreover, pursuant to the Malden procedure the householder is protected by the right to present in his defense any evidence he might have “(a) that the proposed inspection had no reasonable relation to the enforcement of the Sanitary Code, or was to be made for purposes not within the scope of the code, (b) that it was undertaken without proper authority”, “unreasonable, or for any improper purpose, or designed to be a basis for any criminal prosecution (at least until after the defendant had reasonable opportunity to eliminate any violations which might be discovered and had failed to do so)”, “or (c) that it was in some significant respect discriminatory, arbitrary, or capricious, or designed to harass the defendant.” (1966 Mass. Adv. Sh. 1359, 1363; pp. A-5—A-6, *infra*.)

The foregoing distinctions between the *Hadley* case and the cases at bar demonstrate that code enforcement programs cannot be condemned generically, as the appellants in the cases at bar ask this Court to do. The plain need of the public, including building occupants such as Mr. Hadley, for thorough and efficient code enforcement inspections cannot be denied. The question in each case is whether, balancing the interests of the building occupant (including his desire for freedom from *unnecessary* interference with his privacy) against that plain need of the public, the in-

⁶ As a matter of Massachusetts law an act is willful only if it is “intentional and by design, as distinguished from that which is thoughtless or accidental”. *Commonwealth v. Williams*, 110 Mass. 401 (1872); see *New England Trust Co. v. Paine*, 317 Mass. 542, 59 N.E.2d 263 (1945) (an action is willful only if the result of the act, as well as the act itself, is intended); *Commonwealth v. Welansky*, 316 Mass. 383, 397, 55 N.E.2d 902, 910 (1944).

spection proposed can be characterized as violative of the constitutional guarantee against "*unreasonable* searches and seizures". It is impossible to imagine any way in which the occupant's interests can be afforded more consideration than was afforded to Mr. Hadley. There is no sound basis on which a procedure like the Malden procedure can be adjudged "*unreasonable*".

Summary of Argument

That there is a compelling public need for effective programs to obtain information for the development and enforcement of sanitary and other codes—and corresponding police power to establish and carry out such programs—is not seriously debatable. It is unnecessary to dwell upon the extent to which slums and substandard, unsafe and unhealthy conditions exert a corrosive influence upon the welfare of the inhabitants of the cities and towns of the United States. These evils, this need and this power are amply documented in legislative fact findings by both the Congress of the United States and the several state legislatures and have been recognized and reaffirmed by decisions of both this Court and a multitude of lower courts throughout the country. Indeed, effective health, safety and building codes and thorough enforcement thereof are fundamental to stamping out disease, preventing fires, arresting the spread of blight and promoting the renewal and redevelopment of our cities.

A procedure like the Malden procedure constitutionally achieves a practicable and rational balance between the interests of the individual and the requirements of the public good. Mr. Hadley had ample prior notice of the inspection and the opportunity to select, at his convenience, any reasonable time for it. Even if, despite such notice and opportunity, he had failed to conceal something in-

criminating, he would have had the benefit of existing exclusionary rules which are applicable to, *inter alia*, things seized without a warrant. And, even if an inspection could be deemed to be a technical interference with individual privacy, that interference is plainly *de minimis* and, in the balancing of interests involved, any such interference is overwhelmingly outweighed by the essential requirements of and major benefits to the health and safety of the entire community.

The appellants' claim is contrary to the established rule of law in every state which has considered the question. These decisions, as well as other cases in closely related areas, have uniformly recognized and emphasized the vast disparity between, on the one hand, criminal investigations for the fruits or instrumentalities of crime and, on the other hand, administrative inspections for breeding places of disease and latent sources of fire.

The appellants' case is premised upon importation of the criminal law procedure of a search warrant into the field of administrative inspections. Such an imposition is totally inconsistent with the purposes of and need for effective code enforcement. Effective programs to guard against disease and fire would be impossible if probable cause and a warrant were required before each and every fact-finding inspection: Small fires might grow to holocausts, epidemics might spread out of control and the prophylactic effect of health and safety inspections could be wholly lost unless the administrative agency charged with responsibility for code enforcement is able to gather the necessary facts and data an adequate time before some danger materializes. Such advance information is essential to the quasi-legislative functions of identifying potentially dangerous conditions and formulating appropriate protective programs and also to the administrative functions of warning against conduct or conditions which may threaten the public health or

safety and, where necessary, issuing an administrative order that such conduct or conditions be abated.

Probable cause and warrants are concepts which belong uniquely to the criminal law. If they were injected into the administrative *milieu*, the unfortunate judge presented with an application for an "inspection warrant" would be confronted by a Hobson's choice: either he would be forced to substitute his judgment for that of the administrative agency, thus usurping a function entrusted to administrative expertise; or, otherwise, he would be forced to strip all meaning from the concept of probable cause and convert the issuance of warrants into a mere rubber-stamp procedure, a meaningless and routine formality unworthy of the dignity of a court of law.

Argument

The question in the cases at bar cannot be whether the Constitution permits of reasonable systematic inspections to effectuate a program of area-wide code enforcement. It is decades too late to suggest that society is impotent to provide for the thorough and regular inspection which is so clearly necessary, especially in our urban areas, in order to reduce the risk of fire, to prevent the outbreak of disease, to arrest deterioration and to combat dilapidation and kindred blighting influences—any one of which could cripple or destroy the community. Instead, the question must be what institutions are required to participate in the formation and execution of such a code enforcement program—whether the inspection program can be planned and carried out by the responsible administrative agencies, with resort to the courts only when a recalcitrant's obstructing the program makes it necessary to obtain or enforce an injunction or to impose a fine, or whether the

responsible administrative agencies must apply to the courts in advance for permission to inspect each particular property. We respectfully submit that the Malden procedure affords all due deference to the convenience and privacy of occupants—indeed, as much as is possible without endangering the health and safety of the community—and that super-imposition on that procedure of some kind of warrant requirement would serve no legitimate purpose.

I. THE PUBLIC INTEREST DEMANDS ADOPTION AND ENFORCEMENT OF EFFECTIVE PROGRAMS TO ELIMINATE HEALTH AND FIRE HAZARDS.

The appellants' theory that, in the course of a city-wide inspection program, code enforcement inspectors must obtain search warrants just as if they were policemen is premised upon a fundamental misconception and jeopardizes protection of the health and safety of the people of our cities and towns. The inspectors are in no sense policemen investigating a crime; they are administrative personnel seeking information with respect to conditions which might endanger the health or safety of the residents of the respective cities.

Such information is important for two distinct purposes—the elimination of particular hazards that are identified and the formulation of regulations or legislation for the future—in the words of the Supreme Judicial Court

“(a) to prevent, and warn against, conduct or conditions which may threaten the public health or safety, or (b) to obtain information about such conduct and conditions as a basis for later administrative action (and possibly, to some extent, legislative action).”

1966 Mass. Adv. Sh. 1359, 1360; p. A-2, *infra*.

The right to conduct systematic area-wide inspections is essential to each of those purposes.

A. Effective protection against health and fire hazards requires systematic community-wide inspections.

The importance of periodic health and safety inspections has been demonstrated repeatedly. See, e.g., *Enforcement of Housing Codes*, 78 Harv. L. Rev. 801 (1965); Guandolo, *Housing Codes in Urban Renewal*, 25 Geo. Wash. L. Rev. 1 (1956). In the words of this Court,

"The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health" *Frank v. Maryland*, 359 U.S. 360, 371-72 (1959).

Regularity of inspections is important, for the knowledge that every property will be inspected on an established schedule and that there will be no deviation from the inspection routine discourages attempts to evade compliance with code standards.

Health and safety inspections seek to protect all persons alike from disease, fire, and all other threats to their safety and well-being, regardless of whether knowingly or inadvertently maintained and regardless of who is responsible for the condition. Inspections are designed to aid and

protect the person and property of the householder, guests and others who from time to time may be in his house, the residents of the community in general and the public at large. Such inspections must also protect occupants—in particular, the tenants of “slum-lords”—who may be prevented from requesting inspection by intimidation, or fear of it.

In other words, it is the responsibility of the government to use its best efforts to warn of rats and to establish procedures for finding and exterminating them before plague claims its first victim and to regulate the use of lanterns in straw-littered barns before a kick by Mrs. O’Leary’s cow ignites an entire city. Obviously, to discharge that solemn responsibility the government must be able, without undue delay or hindrance, to look into the places where the rats may be nesting and into Mrs. O’Leary’s barn. It is for this reason that administrative officials such as health inspectors have the right to visit and inspect even private houses.

The admission of health inspectors cannot be left to the whim of the individual householder, because the one who bars inspection endangers not only himself, but also other persons who may have no influence upon his decision to refuse: his children, parents, other relations and guests and persons whose business has brought them to the premises. No single person can be permitted to bar his door when by doing so he stands between the state and persons the state has a duty to protect. See *City of St. Louis v. Evans*, 337 S.W.2d 948 (Mo. 1960), where a landlord and his agent denied inspectors entry to the rooms of several boarding-house tenants. See *Chapman v. United States*, 365 U.S. 610 (1961).

Moreover, any person barring inspection may also imperil his neighbors. Any uninspected building may contain

a potential preventable catastrophe.⁷ Therefore, code enforcement programs require total enforcement to be effective. See Stahl and Kuhn, *Inspections and the Fourth Amendment*, 11 U. Pitt. L. Rev. 256 (1950); Comment, 108 U. Pa. L. Rev. 265 (1965). If just one Mrs. O'Leary could exclude the inspector, the inspection of all of the rest of the City of Chicago might be futile.

Fire and disease respect no property lines. A fire starting in one building may explode into a conflagration gutting a neighborhood or an entire community. Filth or faulty water or sewage pipes may begin a process of decay, infection and contagious disease that can spread so broadly and so rapidly that even the most modern developments in medicine are of no avail. Even the twentieth century has been no stranger to the ravages of human death by fire and to epidemics of polio, influenza, typhus and other dread diseases. Any increase in safety of our lives over those of our grandfathers is a product of high standards of public health and safety, implemented by community-wide programs of effective administration of health and safety laws.

Regular inspections are also required in order that the code enforcement agencies may properly discharge their responsibilities, quasi-legislative in character, with respect to formulation and amendment of health and safety regulations and legislation. For example, the Massachusetts Department of Health is expressly directed by the legislature to "conduct sanitary investigations and investigations as to the causes of disease" (Mass. Gen. Laws (Ter.

⁷ Indeed, the suspicion that a condition in violation of the code might be found in his premises—or, a fortiori, knowledge that such a condition was there—is one possible reason for a person's obstructing inspection. In this connection, it is interesting to note that Mr. and Mrs. Hadley at first "stated they would permit an inspection by the code enforcement staff after repairs to the house, which were then underway, would be completed." (p. A-15, *infra*)

Ed.) c. 111, § 5) and to adopt, and, from time to time to amend and modify, a code of health and safety regulations (Mass. Gen. Laws (Ter. Ed.) c. 111, § 127A). This mandate justifies—indeed, requires—that the health inspectors survey conditions in, among other places, privately owned buildings, for the Health Department's formulation and continual review and necessary revisions of the code must be based upon a knowledge of the relevant facts concerning conditions as they exist and change from time to time. See *United States v. Rickenbacker*, 309 F.2d 462 (2d Cir. 1962). Thus a systematic program of inspections is essential for the proper performance of the Health Department's quasi-legislative function, and is justified by the public interest in that function, regardless of the presence or absence of specific violations in the particular houses inspected.

B. *Effective code enforcement is fundamental to prevention and elimination of urban blight and decay.*

As this Court said in *Berman v. Parker*, 348 U.S. 26 (1954):

"Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community . . . which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river." 348 U.S. 26, 32-33.

The formulation, administration and enforcement of effective health and safety codes are integral parts of cur-

rent efforts to redevelop, revitalize and rehabilitate our cities.⁸ *First*, such codes are by statute prerequisite to federal financial assistance for urban renewal. For example, Title I of the Housing Act of 1949, 48 Stat. 1246, as amended, 42 U.S.C. § 1701, *et seq.*, the basic statute which makes available loans and grants of federal money for surveys and inspections to determine existing conditions and for planning and execution of urban renewal undertakings, provides that, if a municipality does not demonstrate an effective pattern of code enforcement, it may be barred from receiving such federal funds. *Second*, code enforcement and consequent rehabilitation are principal modern weapons in the front line of the battle against urban blight and decay.⁹ Wherever rehabilitation is feasible, code enforcement programs and the inspector are certainly more desirable than clearance projects and the bulldozer. Among other things, code enforcement programs are more economical—involving little or no expenditure of public money for land acquisition and clearance costs—and tend to preserve, rather than disrupt, neighborhoods and to reduce problems of relocation—thus avoiding the hardship of displacement of people from their homes and businesses. *Third*, any rehabilitation program must include, as a minimum, the requirement of compliance with applicable codes and effective procedures for administration and enforcement thereof.

⁸ Certain portions of the federal urban renewal statutes which permit and in some instances require code enforcement activities and the authority for such activities in the Massachusetts urban renewal law are quoted in Appendix D to this Brief (pp. A-19—A-22, *infra*).

⁹ See generally "Let There Be Commitment", Report of a Study Group of the Institute of Public Administration to Mayor John V. Lindsay of New York City (Sept. 1966). The fact that code enforcement and rehabilitation projects preserve "the unique historical identity and cohesiveness of . . . [a city's] individual communities" is stressed by the 1965-1975 General Plan for the City of Boston and the Regional Core (p. 60).

Among other things, effective code enforcement is a statutory prerequisite for section 220 or section 221 (d) (3) federal mortgage insurance (see section 101 (c) of Title I (p. A-19, *infra*)). And insurance companies are more willing to issue fire and casualty policies and financial institutions are more willing to accept mortgages where there is area-wide code compliance.

In short, code enforcement and rehabilitation comprise the keystone of the national, state and local programs to renovate our decaying cities and to make them safe and healthy as well as desirable places in which to live. That such code enforcement and rehabilitation programs be facilitated and not frustrated is of the greatest public importance. Otherwise urban decay and blight will steadily worsen until total clearance for redevelopment—with consequent greater expense and hardship—becomes necessary. Any substantial impediment to effective code enforcement poses a grave threat not only within the Cities of Malden, Seattle and San Francisco, but throughout urban America.

II. THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION DO NOT CONDONE APPELLANTS' REFUSAL TO ALLOW MUNICIPAL HEALTH INSPECTIONS

The appellants do not make entirely clear the theoretical premises of their allegations of unconstitutionality. However, under any interpretation of the Fourth and/or Fourteenth Amendments, the constitutionality of reasonable administrative inspections pursuant to a systematic code enforcement program should be sustained. Indeed, it is unnecessary on the facts of the cases at bar for this Court to decide questions of such constitutional magnitude as the severability or lack thereof of the two clauses of the Fourth Amendment, see *Rabinowitz v. United States*, 339

U.S. 56 (1950), or the precise dimensions of the "intimate relationship" between the Fourth and Fifth Amendments; see *Boyd v. United States*, 116 U.S. 616 (1886). In any event, both amendments are now totally applicable to the states. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Ker v. California*, 374 U.S. 23 (1963); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. New York Waterfront Comm'n*, 378 U.S. 52 (1964).

A. *The Malden administrative procedure fully protects every legitimate interest of the individual.*

The presumption of constitutionality which surrounds administrative regulations, *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935), is fully warranted by the procedure employed by health inspectors of the City of Malden. This procedure afforded Mr. Hadley ample prior notice and involved no possibility of forcible entry, so that, had the attempted inspection been wrongful (for example, because it was really harassment and not part of a general plan or for any other of a variety of reasons (see p. 5, *supra*)), Mr. Hadley had an opportunity to raise such wrongfulness in an adversary judicial proceeding before his house was entered. He could have asserted such wrongfulness defensively in an injunctive or criminal proceeding brought against him, 1966 Mass. Adv. Sh. 1359, 1363-64; pp. A-5—A-7, *infra*, or he might have brought a suit for declaratory or injunctive relief. In sharp contrast to the Malden procedure, a search warrant is issued in an *ex parte* proceeding and, by definition, the householder would have no opportunity to be heard until after the right of entry granted by the warrant might have been exercised.

The Malden procedure afforded Mr. Hadley opportunity to schedule the inspection at a time convenient to him and to the members of his household, at a time when the inspec-

tion would minimally disrupt their routine. That procedure precludes any sudden, unexpected knock on the door, accompanied by a demand for immediate entry into the home, and the consequent interference with the householder's use and enjoyment of his dwelling. There can be no surprise inspection.

The Malden procedure was also applied in a constitutional manner. The inspector made every reasonable attempt to respect the convenience and privacy of the occupants of the inspection area. As the Supreme Judicial Court found,

"Efforts to make an appointment for an inspection were continued patiently until the defendant unequivocally refused to cooperate at all Even then, it was only after additional demands for entry with the defendant's consent that the inspector initiated a criminal complaint. The inspector has not attempted to enter without consent or by force . . ." 1966 Mass. Adv. Sh. 1359, 1362-63; p. A-5, *infra*.

The Malden procedure has the additional advantage, by reason of its prior notice requirements; of stimulating and encouraging code compliance. For example, a conscientious citizen who is, in fact, in violation of the local health or safety code may well use the opportunity given him by the notice period to cure offensive conditions, thereby accomplishing the ultimate purpose for which the codes are designed. Treatment of the householder as a potential criminal will hardly encourage the citizen cooperation so necessary to code enforcement. The inspections in question are after all, not retributive but preventative, intended not to punish but to prevent and/or to correct conditions detrimental to community health and safety; and the best interest of both the individual and the general public require that such conditions be eliminated as speedily as possible.

There is no substantial danger that a code enforcement inspection can be used as a vehicle to obtain evidence of unrelated crimes. The prior notice which is part of the Malden procedure gives anyone who may have been engaging in criminal activities ample time to conceal the evidence, fruits or instrumentalities thereof.¹⁰ Moreover, existing exclusionary rules completely protect him from convictions based on any seizure without a warrant or any search beyond the reasonable ambit of the inspection. *Weeks v. United States*, 232 U.S. 383 (1914); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Gould v. United States*, 255 U.S. 298 (1921); *Lefkowitz v. United States*, 285 U.S. 452 (1932); *Trupiano v. United States*, 334 U.S. 699 (1948); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Ker v. California*, 374 U.S. 23 (1963).

And the courts might well exclude other evidence obtained in the course of a health or safety code inspection—although such an exclusion would be based either on a statutory violation or on general standards of fairness, rather than on constitutional imperatives. Note, *Administrative Inspections and the Fourth Amendment*, 65 Colum. L. Rev. 288 (1965).¹¹

¹⁰ Concealment is advisable, however, for that which is in plain view is not the object of a search. *Ker v. California*, 374 U.S. 23, 36-37 (1963); *United States v. Lee*, 274 U.S. 559, 563 (1927) (searchlight or field glasses); *United States v. Barone*, 330 F.2d 543, 544 (2d Cir.), cert. denied, 377 U.S. 1004 (1964); *United States v. Williams*, 314 F.2d 795, 798-99 (6th Cir. 1963) (open trunk of automobile); *People v. Martin*, 45 Cal. 2d 755, 762, 290 P.2d 855, 858 (1955) (window of house) and cases cited therein. Similarly, the householder has the opportunity to remove or conceal any materials or things without the purview of the inspection which, although perhaps perfectly legal and hence of no concern to the state, may be potentially embarrassing to him. See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

¹¹ There are many other exclusionary rules which are not predicated on constitutional grounds. See, e.g., *Mallory v. United States*, 354

As the Supreme Judicial Court found, inspections pursuant to the Massachusetts code are not designed to be the foundation for criminal prosecution for code violations.

"[T]he code's primary purpose from the beginning has been (a) to apply proper health and safety standards reasonably for the protection of the public in the prevention of violations, rather than (b) to punish past violations as criminal offences We interpret reg. 3.1 as having this type of preventive objective. Only incidentally does it seem designed to provide a basis for criminal prosecutions of past violators."¹² 1966 Mass. Adv. Sh. 1359, 1361-62; p. A-4, *infra*.

In the event that prosecution for code violation, rather than an administrative proceeding for a compliance order, were sought on the basis of the health inspector's observations and other evidence obtained during an inspection, the

U.S. 449 (1957) and *McNabb v. United States*, 318 U.S. 332 (1943) (violation of Federal Rules of Criminal Procedure); *Miller v. United States*, 354 U.S. 301 (1958), *Munoz v. United States*, 325 F.2d 23 (9th Cir. 1963 and *United States v. Poppitt*, 227 F.Supp. 73 (D. Del. 1964) (violation of 18 U.S.C. § 3109); *Nardone v. United States* (I), 302 U.S. 379 (1937) and *Nardone v. United States* (II), 308 U.S. 338 (1939) (violation of 47 U.S.C. § 605); *Tyler v. United States*, 194 F.2d 24 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 903 (1952) (lie detector test); Texas Code Crim. Proc., Art. 38.23 (§ 727a of 1929 edition). Similarly, entrapment, although not itself either illegal or constitutionally reprehensible, is a criminal defense. Entrapment by a state officer is a complete defense to even a federal prosecution. *Henderson v. United States*, 237 F.2d 169 (5th Cir. 1956), noted in 70 Harv. L. Rev. 1302 (1957).

¹² A state court's interpretation of a state statute is binding upon this Court. *NAACP v. Button*, 371 U.S. 415, 432 (1963); *Terminello v. Chicago*, 337 U.S. 3, 4 (1949) and cases cited therein.

According to the definitions suggested by this Court in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) and *Helvering v. Mitchell*, 303 U.S. 391 (1938), the fine levied in the present case is a civil penalty. See *Hepner v. United States*, 213 U.S. 103 (1909); *Olshansen v. Commissioner of Internal Revenue*, 273 F.2d 23 (3d Cir. 1959), *cert. denied*, 363 U.S. 820 (1960).

rights of the defendant in such a prosecution would be adequately protected by the opportunity to move to suppress or strike such evidence or to object thereto at trial. See *Commonwealth v. Hadley*, 1966 Mass. Adv. Sh. 1359, 1363; p. A-5, *infra*; *People v. Laverne*, 14 N.Y. 2d 304, 200 N.E.2d 441 (1964).¹³ Public policy is far better served and the competing interests involved are more wisely reconciled by such exclusionary rules than by a wholesale prohibition or crippling of inspection programs.

B. The constitutionality of the Malden program of administrative code enforcement inspections clearly established by relevant precedent.

It is a settled principle of Anglo-American jurisprudence that the right of a property owner to exclude the universe is limited by consideration of the needs of the public health, safety, morals and welfare. The precise question at bar—the right of fire and health inspectors to make reasonable entry pursuant to a systematic program of inspections—has been considered in eleven reported cases. With but one exception, *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949) (Judge Holtzoff dissenting), *affirmed on other grounds*, 339 U.S. 1 (1950), every court that has considered the question has recognized the importance of the public interest in prevention and control of disease and fire and has held that, notwithstanding objection of the householder, administrative inspectors may make reasonable inspections for conditions likely to cause fire or disease.

¹³ There is also precedent for the extension of the exclusionary rule into administrative and civil law. See, e.g., *Rogers v. United States*, 97 F.2d 691 (1st Cir. 1938); *Lassoff v. Gray*, 207 F. Supp. 843 (W.D. Ky. 1962); *Schenck ex rel. Chow Fook Hong v. Ward*, 24 F. Supp. 776, 778 (D. Mass. 1938); *Lebel v. Swincicki*, 334 Mich. 427, 93 N.W. 2d 281 (1958).

In addition to the cases at bar, those cases included *Ohio ex rel. Eaton v. Price*, 168 Ohio St. 123, 151 N.W. 2d 523 (1958), *probable jurisdiction noted*, 360 U.S. 246 (1959), *affirmed by an equally divided Court*, 364 U.S. 263 (1960), a case factually indistinguishable from the *Hadley* case, as well as *City of St. Louis v. Evans, supra*; *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1950); *DePass v. City of Spartanburg*, 234 S.C. 198, 107 S.E.2d 350 (1959); *State v. Rees*, 139 N.W. 2d 406 (Iowa 1966). The factual context in which *Frank v. Maryland*, 359 U.S. 360 (1959), arose was slightly different in that the health inspector in that case had reason to believe that there was a specific condition dangerous to health on the defendant's premises; however, Mr. Justice Frankfurter, in his opinion, treated a program of systematic inspections as equivalent to investigation for the purpose of correction of a particular circumstance.

"Time and experience have forcefully taught that the power to inspect dwelling places, *either as a matter of systematic area-by-area search*, or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health...." 359 U.S. 360, 372. (Emphasis added.)

Accord, *Givner v. State*, 210 Md. 484, 124 A.2d 764 (1955).

Thus, in every case for more than fifteen years, the right of reasonable health and fire inspection without a warrant has been upheld. The analogy between the inspection by health and fire inspectors, seeking to discover conditions dangerous to health and safety and police investigators searching for the fruits and instrumentalities of crime has been consistently rejected. The distinction between criminal investigations and civil inspections is deeply embedded in

the history of constitutional adjudication and has long been accepted by the courts and by society. The thrust of the Fourth, Fifth and Sixth Amendments obviously is to protect individuals against forced searches for evidence "to be used in criminal prosecutions or for forfeitures" and it was on this issue that "the great battle for fundamental liberty was fought." 359 U.S. 360, 365. As the Court said in *Frank v. Maryland, supra*,

"Inspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, has antecedents deep in our history." 359 U.S. 360, 367.

These principles have similarly been judicially recognized and reaffirmed in several analogous areas. See, e.g., *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of unwholesome food); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination); *United States v. Rickenbacker*, 309 F.2d 462 (2d Cir. 1962) (census questionnaire); *Dederick v. Smith*, 88 N.H. 63, 184 Atl. 594, appeal dismissed for want of substantial federal question, 299 U.S. 506 (1936) (inspection of domestic animals); *United States v. Powell*, 379 U.S. 48 (1964); *Abel v. United States*, 362 U.S. 217 (1960); Miller, *Administrative Agency Intelligence-Gathering*, 6 B.C. Ind. & Com. L. Rev. 657 (1965).

III. THE SEARCH WARRANT PROCEDURE WOULD BE FOREIGN TO THE ESSENTIAL NATURE OF ADMINISTRATIVE HEALTH AND SAFETY INSPECTIONS.

Constitutional standards of reasonableness are the product of an effort to balance individual interests against the common good. Indeed, Anglo-Saxon jurisprudence is pre-

licated upon the theory that the individual exchanges certain personal privileges for certain other privileges and benefits which the individual receives from the state. In the criminal context, the search warrant is of great importance as a device by which this equation is balanced. In the administrative context, however, a search warrant procedure would serve no useful purpose: it would hobble administrative code enforcement but it would provide in return no greater protection of individual rights. Thus a search warrant requirement imposed upon code enforcement inspections would create—instead of an equation—a senseless imbalance.

A. Police investigations and health inspections are fundamentally different.

Health and safety inspections are designed not to mete out retribution for injuries already caused but rather to uncover and correct in advance conditions which might cause harm (see pp. 18-19, *supra*) and to supply information for the administrative agency's fulfillment of its quasi-legislative responsibilities (see pp. 9, 12-13, *supra*). Indeed, this is one of the major differences between police investigations for the enforcement of the criminal law and administrative code enforcement inspections.

A code enforcement inspection is also distinguishable from a police investigation in that health and safety inspections will normally consume less time and be less intimate and personal. Moreover, whereas there is a stigma attached to a visit by the police, no such implication is involved in systematic area-wide inspections.

A police investigation is justified by the suspicion of certain specific acts violative of the penal law. It is obviously logical and meaningful therefore to test the soundness of that suspicion and the probability that such acts

actually have occurred. In other words, what the circumstances of the particular case are is a question involving facts which are susceptible of proof, and whether those circumstances justify search and seizure by the police is a justiciable issue appropriate for determination by a court.

In contrast, the right to make health inspections does not depend upon any special facts concerning any particular building. The necessity for such inspections is a matter to be determined in the expertise of the administrative agency charged with code enforcement and the related quasi-legislative functions and is therefore not a justiciable issue.¹⁴

The appellant in *Camara* asks, at page 21 of his Brief,

"In those situations where the occupant will not allow him to enter, will not in almost all instances an inspection of the exterior, complaints from neighbors or the process of elimination of other causes of a specific effect show grounds upon which a search warrant could issue?"¹⁵

Plainly, the answer to that question must be "No". It is absurd to suggest that the inspector cannot eliminate potential causes of fire and cannot enter until he can see smoke from outside. Moreover, as has been demonstrated (pp. 11-12, *supra*), "almost all instances" is not enough,

¹⁴ *Moog Industries v. Federal Trade Comm'n*, 355 U.S. 411 (1958); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943); *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939); *Moskow v. Boston Redevelopment Authority*, 349 Mass. 553, 210 N.E. 2d 699 (1965), cert. denied, 382 U.S. 983 (1966).

¹⁵ An adequate system of health and safety inspections cannot be premised upon complaints, which could support a showing of probable cause, because, universally, experience has been that only a minute proportion (less than five per cent) of violations become the subject of complaints. Therefore code enforcement based only on complaints would fall far short of the systematic program which is necessary.

for one germ or one spark can spell disaster for the entire community.

B. Traditional standards of probable cause are not meaningful in the present context.

As has been demonstrated (pp. 11-12, *supra*), the prime distinction between the policeman and the health inspector is that whereas the policeman is seeking to apprehend the perpetrator of a crime already committed, the inspector is seeking to uncover circumstances detrimental to health and safety *before* any injury is sustained. If it were required that there be evidence of existing injury before an inspection were to be permitted, a health inspection could serve no preventive purpose, for the evidence required before a warrant may issue is most often not apparent outside of the building. Sources of potential danger that may start a conflagration or a widespread contagion are not ascertainable without actually seeing them. Many conditions which are particularly dangerous and therefore particularly of concern for purposes of health inspections (such as piles of oily rags and backed-up toilets) are concealed behind building walls where they cannot be detected or, normally, even suspected prior to inspection and therefore could not possibly be cited as "probable cause" for an inspection.

Even the dissent in *Frank v. Maryland, supra*, apparently recognizing the inapplicability of traditional probable cause standards, suggested as a substitute a watered-down version of probable cause:

"Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an infer-

ence where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant." 395 U.S. 360, 383.

That suggestion, however, offers no solution to any problem. If the warrant procedure is to become a mere "rubber-stamp" process, pursuant to which warrants will be issued in quantity upon a showing that there is a neighborhood inspection plan, and without any review of that plan, then the procedure, although bothersome to the administrative agency, offers no protection to the householder and is unworthy of the dignity of a court of law. But the frequency and extent of systematic health inspections are matters entrusted by the legislature to determination by an administrative agency in its expertise, and therefore if the court were to entertain an attack on the plan, and to substitute its judgment as to the appropriateness of inspections for the expertise of the agency, it would thus virtually usurp the role for which the agency is uniquely suited. In neither case does the suggested procedure present a justiciable issue or an appropriate function to be performed by a court of law.

The magnitude of the public need for meaningful programs of code enforcement and rehabilitation has been amply documented. Any minor interference with individual privacy which might result from implementation of those programs is overwhelmingly outweighed by the public need for effective code enforcement and rehabilitation programs and the benefits such programs afford to all members of our urban society. The appellants' assertion of a so-called

right to obstruct those programs is without basis in the Constitution of our jurisprudence and has been rejected by every state court which has considered it. It should be similarly rejected by this Court.

Conclusion

For the reasons stated, the decisions of the courts below should be affirmed.

Respectfully submitted,

- ELLIOT L. RICHARDSON, *Attorney General*
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 Authority*

Appendix A

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH.

MIDDLESEX COUNTY November 7, 1966-December 2, 1966

No. 13613

COMMONWEALTH

v.

LEWIS F. HADLEY

Present: WILKINS, C.J., SPALDING, CUTTER, SPIEGEL, & REARDON, JJ.

CUTTER, J. The code enforcement inspector of the Malden board of health filed a complaint in the District Court alleging that, on June 7, 1965, Hadley "did wilfully impede or obstruct an inspection . . . by the" code enforcement inspector upon certain premises in Malden. In the District Court, Hadley was found guilty of violating the Sanitary Code of the Department of Public Health,¹ art. 1,

¹ The Sanitary Code, art. 1, reg. 3, was adopted by the department on September 13, 1960. See G. L. c. 111, § 5, as amended by St. 1957, c. 678, § 1, St. 1959, c. 522, and St. 1960, c. 172. Section 5 reads in part: (see 2d par. as amended in 1959) "Said department shall adopt . . . public health regulations to be known as the . . . sanitary code, which may provide penalties for violations . . . not exceeding five hundred dollars for any one offence . . . The code shall deal with matters affecting the health and well-being of the public . . . in subjects over which the department takes . . . responsibility. . . . Local boards of health shall enforce said code in the same manner

reg. 3.1.² He appealed. Upon this appeal, Hadley filed a waiver of trial by jury, and was tried upon a statement of agreed facts. The trial judge found him guilty, imposed a fine of \$50 and reported the case to this court upon the following issue: "[w]hether the protections embodied in the fourth and fourteenth amendments to the Constitution of the United States shelter the owner-occupier of a single family . . . [house] from prosecution for refusing to admit municipal inspectors who demand entry and are without probable cause and without a warrant authorizing entry." We must consider important practical aspects of the power of administrative officials to inspect dwelling houses in a reasonable manner either (a) to prevent, and warn against, conduct or conditions which may threaten the public health or safety, or (b) to obtain information about such conduct and conditions as a basis for later administrative action³ (and possibly, to some extent, legislative action).

in which local health . . . regulations are enforced "The superior court shall have jurisdiction in equity to enforce . . . [the] code." The 1960 amendment added a provision that the "code may provide for the demolition, removal, repair or cleaning by local boards of health of any structure which so fails to comply with the standards of fitness for human habitation or other regulations in said code as to endanger or materially impair the health or well-being of the public."

² Regulation 3.1 provides, "In order . . . to carry out their . . . responsibilities under this code and . . . to protect the health and well-being of the people . . . the board of health and the Department of Public Health or the authorized . . . representative of either are authorized to enter, examine, or survey *at any reasonable time* such places as they consider necessary, and otherwise to conduct such examination or survey as is expressly provided in any other article. Any person who *wilfully, impedes or obstructs* an inspection or examination by the board of health or the Commissioner of Public Health or the authorized . . . representative of either in the discharge of his official duties shall be fined not less than ten nor more than fifty dollars" (emphasis supplied). By reg. 4.1, "each board of health may enforce this code by fine . . . or otherwise at law or in equity in the same manner that local . . . regulations are enforced."

³ The amici curiae suggest that the issue is important in connection with programs of urban redevelopment, housing, slum clearance, rehabilitation of decadent areas, and other similar social projects.

The agreed facts may be summarized: "Pursuant to a [city] program of code enforcement . . . the objective of which was to reveal conditions in private dwellings that may endanger the health and well being of occupants due to unsanitary circumstances or fire hazards, a staff of inspectors had, prior to . . . [this] case, and by prearrangement with the occupants been entering and inspecting dwellings in the city. Prior to the announced plan to inspect the home of the defendant many homes in the city had been inspected. During . . . August 1964 the first announcement . . . of the city's intention to inspect was delivered . . . in [the] defendant's neighborhood . . . including . . . [his] single family dwelling. Other letters and cards were mailed to the defendant asking for an appointment. . . . [T]he defendant did not reply, but his wife would call the chairman of the code enforcement commission." A staff inspector "visited the site and asked about a time for inspection. [The d]efendant's wife asked what the inspectors would be looking for and if there was a complaint, or warrant to enter. The staff inspector assured her there was no specific complaint or warrant and that the city was inspecting all homes in the district as part of a program to insure compliance with sanitary and safety laws. . . . [She] stated she did not want to have the house inspected without a showing of probable cause or a complaint of specific violation. [The d]efendant and his wife stated they would permit an inspection by the code enforcement staff after repairs to the house . . . then underway . . . [were] completed. Later the defendant stated he would not agree to an inspection unless there were a showing of a specific complaint or unless a valid warrant to enter had issued." Since then, "additional demands have been made to gain entry by appointment and have been refused The [city] program of inspecting all homes by area . . . remains in operation"

1. Examination of the enactments authorizing the Sanitary Code, of the legislative history, and of the code itself indicates that the code's primary purpose from the beginning has been (a) to apply proper health and safety standards reasonably for the protection of the public in the prevention of violations, rather than (b) to punish past violations as criminal offences. See 1957 House Doc. No. 2833; 1965 House Doc. No. 4040 (esp. at pp. 54-55, see fn. 6, *infra*), a report in part the basis of St. 1965, c. 898, §§ 1, 3 (see 1965 House Bills Nos. 4441, 4449), which transferred the legislative authority for promulgating the code, formerly in G. L. c. 111, §5, to c. 111, §§ 127A-127J. This type of prevention appears to be the general objective of similar codes throughout the country. See Carlton, Landfield, and Loken, *Enforcement of Municipal Housing Codes*, 78 Harv. L. Rev. 801, esp. at pp. 806-809.⁴ We interpret reg. 3.1 (fn. 2) as having this type of preventive objective. Only incidentally does it seem designed to provide a basis for criminal prosecutions of past violators.

2. Regulation 3.1 (fn. 2) in terms requires that any inspection pursuant to its provisions shall be at a "reasonable time." The Malden code enforcement inspector correctly interpreted this provision as requiring that he respect the convenience and privacy of the occupants of premises so far as practicable and consistent with the public interest in the circumstances. The area inspection now in progress does not appear to have been of an emergency character, and we do not now consider the greatly different

⁴See also annotation, 65 Col. L. Rev. 288. Area inspection programs to prevent future or continuing violations, rather than punishing past violations, are in some degree analogous to statutory programs of compulsory vaccination, designed to prevent the outbreak of smallpox. See G. L. c. 111; § 181; *Jacobson v. Massachusetts*, 197 U.S. 11, 24-39.

issues which might be created by emergency conditions.⁵ We treat this case as one in which the code contemplated that such an area inspection would proceed in an orderly manner (but, of course, without undue delay) and with due consideration for the interests and privacy of occupants.

The enforcement inspector seems to have acted throughout with commendable respect for the defendant's privacy and convenience. Efforts to make an appointment for an inspection were continued patiently until the defendant unequivocally refused to cooperate at all in the absence of a warrant or a specific complaint. Even then, it was only after additional demands for entry with the defendant's consent that the inspector initiated a criminal complaint. The inspector has not attempted to enter without consent or by force, and we have, of course, no occasion to consider the use (in any unlikely prosecution of a past violation) of evidence obtained by means of the inspection. Cf. *People v. Laverne*, 14 N. Y. 2d 304. Cf. also annotation, 65 Col. L. Rev. 288, 293.

3. The statute and the code (see fns. 1, 2) would have permitted the inspector to seek, by bill in equity in the Superior Court, an order requiring the defendant to permit an inspection at a reasonable time. In such a proceeding the defendant would have been able to present, in his effort to defeat the issuance of an order, any available evidence (a) that the proposed inspection had no reasonable relation to the enforcement of the Sanitary Code, or was to be made

⁵ The code (see reg. 5.1) deals with the special considerations which may affect emergencies. It reads in part: "Whenever an emergency exists which . . . requires that ordinary procedures be dispensed with, the board of health . . . acting in accordance with . . . [G. L. c. 111, § 30] may, without notice or hearing, issue an order reciting the . . . emergency and requiring . . . such action . . . as the board . . . deems necessary to meet the emergency. . . . [A]ny person to whom such order is directed shall comply therewith within the time specified . . ." Cf. powers of police in an emergency. *United States v. Barone*, 330 F.2d 543, 544-545 (2d Cir.), cert. den. 377 U.S. 1004.

for purposes not within the scope of the code, (b) that it was undertaken without proper authority, or (c) that it was in some significant respect discriminatory, arbitrary, or capricious, or designed to harass the defendant. Such an equity proceeding, of course, would have been likely to involve some delay and more than nominal expense. The inspector thus reasonably may have thought that the criminal sanction under reg. 3.1 provided a simpler and less cumbersome method for encouraging the cooperation of the defendant through the imposition of a fine. See *Commonwealth v. Sostilio*, Mass.

The present record contains no suggestion (a) that the area inspection was unauthorized, unreasonable,⁶ or for any improper purpose, or designed to be a basis for any criminal prosecution (at least until after the defendant had reasonable opportunity to eliminate any violations which might be discovered and had failed to do so); or (b) that any discriminatory, arbitrary, or capricious action affecting the defendant or his property was proposed; or (c) that there was harassment. The defendant simply refuses to permit "[i]nspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law." See *Frank v. Maryland*, 359 U. S. 360, 367. See also *Eaton v. Price*, 168 Ohio St. 123, affirmed by an equally divided court, 364 U. S. 263.

4. The agreed facts present directly no question concerning what defences the defendant could have raised and what evidence he could have presented at the trial of a criminal complaint under reg. 3.1. The answers to these

⁶ Mass. Adv. Sh. (1966) 1337, 1339.

⁶ In the article in 78 Harv. L. Rev. 801, 807, already cited, the advantages of area inspections in preventing violations and area deterioration are described in detail. This portion of this article was cited with apparent approval in 1965 House Doc. No. 4040, pp. 54-55.

questions, however, bear indirectly upon whether the criminal sanction in reg. 3.1 is a constitutionally valid method of encouraging consent to an administrative public health inspection. We think that reg. 3.1 does not make it an offence for an occupant to refuse to permit an unauthorized, unreasonable, or discriminatory inspection. Accordingly, we interpret the regulation as permitting a defendant, prosecuted under it, to prove any one or more of the defences which he could assert in equity in opposition to the granting of an order to permit an inspection. The general nature of these defences has already been stated.

The practical considerations supporting health inspections, discussed in the majority opinion in the *Frank* case, 359 U. S. 360, 371-372, and the result of that case, amply justify a prosecution for refusing to consent to an administrative inspection without a warrant of the type permitted by reg. 3.1 as we interpret it. To prevent, for the benefit of the whole community, health hazards and unsafe conditions likely to cause sickness, fires, and other casualties, such inspections are necessary in a modern urban civilization. We think that the Legislature, in authorizing the Sanitary Code, and the Department of Public Health, in promulgating reg. 3.1, have acted within constitutional limits. The result of the affirmation in the *Eaton* case, 364 U. S. 263, supports this view.⁷

⁷ Two cases, now pending before the Supreme Court of the United States, present questions generally similar to those considered in the *Frank* case. See *Camara v. Municipal Court*, 237 Cal. App. 2d 128 (U. S. Supr. Ct. Oct. term 1966, No. 92); *See v. Seattle*, 67 Wash. 2d 465, also 408 Pac. 2d 262 (U. S. Supr. Ct. Oct. term 1966, No. 180). Probable jurisdiction was noted in these cases on October 11, 1966. See (1966) 35 U.S.L. Week 3124. Cases which in general are consistent with the *Frank* case include *Givner v. State*, 210 Md. 484, *St. Louis v. Evans* (Mo.), 337 S. W. 2d 948, 954-959, *Richards v. Columbia*, 227 S. C. 538, 556. See *Dederick v. Smith*, 88 N. H. 63, 71-73. See also *United States v. Rickenbacker*, 309 F.2d 462, 463 (2d Cir.) cert. den. 371 U. S. 962 (census inquiry); *State v. Rees*, Iowa, (139 N. W. 2d 406).

5. The provisions of G. L. c. 111 authorizing promulgation of the Sanitary Code (formerly § 5, and now §§ 127A, 127B) and regs. 3.1 and 4.1 (fn. 2) themselves make no explicit provision for a search warrant in circumstances such as those before us. These statutes and the regulations, however, permit the code enforcement inspector to use the procedures mentioned in G. L. c. 111, § 131 (governing the examination of premises for nuisances),⁸ at least in those situations where there is reasonable ground to believe that a nuisance exists. See also c. 111, § 165 (inspection for pollution of water supplies).

Section 131 seems to have been drawn primarily to deal with investigations based on complaints of nuisances and situations where there is some evidence of an actual nuisance on particular premises. Nevertheless, the words "examine into and destroy . . . or prevent a nuisance," are very broad and may permit obtaining a warrant to enforce a purely preventive area inspection despite the circumstance that no nuisance is known to exist, or to be threatened, within the area. We assume, without deciding,

⁸ Section 131 reads, "If the board considers it necessary for preservation of life or health to enter any land, building or premises . . . to examine into and destroy, remove or prevent a nuisance, source of filth or cause of sickness, and the board . . . is refused such entry, any member of the board . . . may make complaint to a justice of any court of record or to a magistrate authorized to issue warrants, who may thereupon issue a warrant, directed to . . . [a] member or agent of the board . . . commanding him to take sufficient aid and at any reasonable time repair to the place where such nuisance . . . may be, and to destroy, remove or prevent the same, under the direction of the board." Cf. the provisions concerning inspections for the purpose of preventing fires. G. L. c. 148, § 4 (as amended through St. 1964, c. 123), § 5 (as amended through St. 1962, c. 456). The situation presented by the agreed facts does not appear to be one in which a search warrant could have been issued, on usual principles of "probable cause," under the statutes governing warrants in criminal cases. See G. L. c. 276, §§ 1-3A, inclusive, as amended. See also the cases collected in *Commonwealth v. Monosson*, Mass. , (Mass. Adv. Sh. [1966] 1225, 1226-1228).

that § 131 does authorize such a warrant, although it does not specify, as would have been desirable, (a) what criteria are to govern magistrates in issuing warrants for such inspections, or (b) whether a warrant may issue upon proof only that a reasonable, nondiscriminatory, public health area inspection has been authorized and is being undertaken and that entry has been refused.⁹ Even if § 131 is thus construed, however, we think that neither (a) the statutes as supplemented by regs. 3.1 and 4.1, nor (b) general constitutional principles, in the light of the *Frank* case, 359 U. S. 360, 367, required the code enforcement inspector to have resort to § 131 to obtain a warrant. He was free to make use either of a bill in equity or the criminal sanction of reg. 3.1.

6. The defendant does not argue that, by denying admission, he did not "wilfully impede or obstruct" the inspector. Cf. *District of Columbia v. Little*, 339 U. S. 1, 4, 6-7, where the Supreme Court of the United States construed a somewhat comparable District regulation (penalizing, see p. 5, "interfering with or preventing" any inspection authorized by the regulations) as not making it an offence merely to decline to permit health officers to inspect.

Despite language of the *Little* case (holding that the word "interfere" in the regulation could not (p. 7) "fairly be interpreted to encompass [the] respondent's failure to unlock her door and her remonstrances on constitutional grounds"), we construe the somewhat different language of reg. 3.1 as designed to punish a definitive refusal to permit a reasonable and authorized inspection. We regard reg. 3.1

⁹ This type of proof might constitute a specialized type of modified "probable cause" adapted to general public health and fire inspections where the object of the inspection is merely precautionary and preventive. See Mr. Justice Brennan's discussion in *Eaton v. Price*, 364 U.S. 263, 271. See also the dissent in the *Frank* case, 359 U.S. 360, 374, 383; *Waters, Rights of Entry in Administrative Officers*, 27 U. of Chicago L. Rev. 79.

as comparable in purport to a statute (applicable to the District of Columbia and making it an offence to "hinder, prevent, or refuse to permit any lawful inspection"), distinguished in the *Little* case, 339 U. S. 1, 6 (see fn. 7), from the regulation directly there discussed.

7. We hold that, in the circumstances shown by the statement of agreed facts, the defendant's refusal to permit inspection was properly found to be in violation of reg. 3.1. The issue presented by the report is answered in the negative.

So ordered.

Louis M. Nordlinger for the defendant.

Loyd M. Starrett, Legal Assistant to the District Attorney (*Ruth I. Abrams*, Assistant District Attorney, with him), for the Commonwealth.

Lewis H. Weinstein & Judith L. Olans for Boston, Brookline, Cambridge, Malden & Worcester Redevelopment Authorities, amici curiae, joined in the Commonwealth's brief.

Max Rosenblatt, Assistant City Solicitor, for the City of Malden, amicus curiae, submitted a brief.

Appendix B

COMMONWEALTH OF MASSACHUSETTS

THIRD DISTRICT COURT OF EASTERN MIDDLESEX

Middlesex, ss.

Criminal, No. A1764-1965

COMMONWEALTH

vs.

LEWIS F. HADLEY

REPORT TO THE SUPREME JUDICIAL COURT

In accordance with the provisions of General Laws (Ter. Ed.), Chapter 278, Section 30, I herewith report to the Supreme Judicial Court the question of law hereinafter set forth in the above entitled case.

This case came before me by appeal from The First District Court of Eastern Middlesex, from a finding of guilty on a complaint charging the defendant "did willfully impede or obstruct an inspection or examination by the Code Enforcement Inspector of the Board of Health in and upon certain premises located at 14 Holyoke Street in said City of Malden, in violation of regulation #3, Article #1 of the Sanitary Code".

Article I, Regulation 3.1 of the Sanitary Code, adopted by the Department of Public Health on September 13, 1960, provides as follows:

"In order properly to carry out their respective responsibilities under this Code and properly to protect the health and well being of the people of the Commonwealth, the Board of Health . . . or the authorized agent or representative of either are authorized to enter, examine, or survey at any reasonable time such places as they consider necessary, and otherwise to conduct such examination or survey as is expressly provided in any other article. Any person who wilfully impedes or obstructs an inspection or examination by the Board of Health . . . or the authorized agent or representative . . . in the discharge of his official duties shall be fined not less than \$10.00 nor more than \$50.00".

The defendant filed a waiver of his right to a trial by jury and was tried without a jury before me upon a Statement of Agreed Facts.

The defendant presented a motion for a finding of not guilty. I denied this motion and found the defendant guilty and imposed a fine of Fifty Dollars (\$50.00). The defendant duly excepted to the denial of his motion and to my finding the defendant guilty.

The question of law which is herewith presented for determination by the Supreme Judicial Court is:—

WHETHER THE PROTECTIONS EMBODIED IN THE FOURTH AND THE FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES SHELTER THE OWNER-OCCUPIER OF A SINGLE FAMILY HOME FROM PROSECUTION FOR REFUSING TO ADMIT MUNICIPAL INSPECTORS WHO DEMAND ENTRY AND ARE WITHOUT PROBABLE CAUSE AND WITHOUT A WARRANT AUTHORIZING ENTRY.

I am of the opinion that the question of law herein set forth is so important or doubtful as to require the decision

of the Supreme Judicial Court and I have stayed further proceedings in this case and with the defendant consenting thereto, I herewith report the same to the Supreme Judicial Court for decision.

If, as a matter of law, the Court should have found the defendant not guilty, then such finding of guilty is to be set aside and the appropriate finding of not guilty ordered; otherwise, the finding of guilty is to stand.

HENRY P. CROWLEY, Special Justice
Third District Court of East Middlesex
Sitting pursuant to the provisions of
Chapter 628, Acts of 1964.

Filed March 25, 1966

THE COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

TO THE FIRST DISTRICT COURT OF EASTERN MIDDLESEX, holden at Malden, for the transaction of criminal business, within the County of Middlesex:

John F. Burke Code Enforcement Inspector of Malden in the County of Middlesex, in behalf of THE COMMONWEALTH OF MASSACHUSETTS, on oath complains that Lewis F. Hadley of Malden in the County of Middlesex, on or about the seventh day of June in the year of our Lord one thousand nine hundred and sixty-five at Malden, in the County of Middlesex, and within the judicial district of said Court, did wilfully impede or obstruct an inspection or examination by the Code *Endforcement* Inspector of the Board of Health in *an* upon certain premises located at 14 Holyoke Street in said City of Malden, in violation of regulation #3 article #1 of the Sanitary Code, against the peace of the said Commonwealth and the form of the statute in such case made and provided.

JOHN F. BURKE

FIRST DISTRICT COURT OF EASTERN MIDDLESEX

Received and sworn to, this twenty-second day of June in the year of our Lord one thousand nine hundred and sixty-five.

BEFORE SAID COURT,
JOHN P. MITCHELL, JR.
Deputy Assistant Clerk

A True Copy,
[SEAL]

Attest: ORRIN P. BARSTOW
Assistant Clerk of the First District Court of Eastern
Middlesex

WAIVER OF TRIAL BY JURY.

Now comes the defendant in the above entitled cause and waives all of his rights to a trial by jury.

LEWIS F. HADLEY

Filed February 9, 1966

STATEMENT OF AGREED FACTS

Pursuant to a program of code enforcement undertaken by the city, the objective of which was to reveal conditions in private dwellings that may endanger the health and well being of occupants due to unsanitary circumstances or fire hazards, a staff of inspectors had, prior to the instant case, and by prearrangement with the occupants been entering and inspecting dwellings in the city. Prior to the announced plan to inspect the home of the defendant many homes in the city had been inspected.

During the month of August 1964 the first announcement, in writing, of the city's intention to inspect was delivered to the homes in defendant's neighborhood and including defendant's single family dwelling. Other letters and

cards were mailed to the defendant asking for an appointment. Upon receipt of these notices the defendant did not reply, but his wife would call the chairman of the code enforcement commission. One of the staff inspectors visited the site and asked about a time for inspection. Defendant's wife asked what the inspectors would be looking for and if there was a complaint, or warrant to enter. The staff inspector assured her there was no specific complaint or warrant and that the city was inspecting all homes in the district as part of a program to insure compliance with sanitary and safety laws. Defendant's wife stated she did not want to have the house inspected without a showing of probable cause or a complaint of specific violation. Defendant and his wife stated they would permit an inspection by the code enforcement staff after repairs to the house, which were then underway, would be completed. Later the defendant stated he would not agree to an inspection unless there were a showing of a specific complaint or unless a valid warrant to enter had issued.

Since that occurrence additional demands have been made to gain entry by appointment and have been refused by defendant. The program of inspecting all homes by area of the city has continued and remains in operation as of the date of filing this agreed statement of facts.

CARLOS VARZEAS

Assistant District Attorney

Counsel for the Commonwealth

LOUIS M. NORDLINGER

Counsel for Defendant

Filed Feb. 9, 1966

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Now comes the defendant in the above entitled matter and moves that the court direct a verdict of not guilty, and as grounds therefor the defendant states there has been no showing by the Commonwealth that he has acted in an unlawful manner as charged in the complaint and there has been no showing that the persons alleged to have requested entrance into defendant's home had the authority to enter by reason of a warrant or probable cause, and the defendant submits that he is protected from such unwarranted and unreasonable entries and searches of his home by the provisions of the Fourteenth Article of Amendment to the Constitution of the United States and the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts.

By his attorney,

LOUIS M. NORDLINGER

February 25, 1966 Filed in Court.

ALBERT H. BURNS

Assistant Clerk.

February 25, 1966 Denied by the Court.

CROWLEY, SP. J.

Defendant's Exceptions Saved.

CROWLEY, SP. J.

FINDING.

In the above complaint, the defendant having waived his right to a trial by jury (G. L., c. 263, Sec. 6, Ter. Ed.), I find the defendant guilty.

HENRY P. CROWLEY

Special Justice of the Third District
Court of Eastern Middlesex

1966, February, 25

DOCKET ENTRIES

ATTORNEY: LOUIS M. NORDLINGER

33 Mt. Vernon St., Boston

Complaint: Sanitary Code — Wilfully Impeding or
Obstructing Inspection of Premises

DISTRICT COURT: MALDEN JUSTICE: L. G. BROOKS

District Court Plea: NG Finding: G

Disposition: Fine \$50—Appeal

Complainants: John F. Burke Code Enforcement Inspector
Malden

No. of Paper	Date of Entry	Docket Entries
1	1965, Oct. 20	Copy of Complaint
2	1965, Oct. 20	Recognizance
3	1965, Oct. 20	Record of Lower Court
4	1965, Oct. 20	Certificate of Transfer of Case from Superior Court to Jury of Six
	1965, Dec. 10	Continued to 1966, January 7
	1966, Jan. 7	Continued to 1966, February 8
	1966, Feb. 8	Continued to 1966; February 9
5	1966, Feb. 9	Jury Waiver Filed—Jury Waived
6	1966, Feb. 9	Statement of Agreed Facts—Filed Crowley, Sp. J.
	1966, Feb. 9	Continued to 1966, February 25
7	1966, Feb. 25	Defendant's Motion for Directed Ver- dict—Filed in Court Motion Denied Crowley, Sp. J. Defendant's Exceptions Saved Crow- ley, Sp. J.
8	1966, Feb. 25	Finding of Guilty Fine \$50.00 Suspended Pending Re- porting of Case to Supreme Judicial Court Crowley, Sp. J.
9	1966, Mar. 25	Report

Appendix C

The following chart illustrates the extent of code enforcement in 1965 in the approximately 19,000 dwelling units in the City of Malden.

<i>Code</i>	<i>Municipal Agency</i>	<i>Permits Issued</i>	<i>Inspections Conducted</i>	<i>Violations Noted</i>
Building Fire	Building Inspector	655	655	100
	Fire Inspection / Division of Fire Department	615	1135	14
Sanitary	Code Enforcement Department	—	1404	989*
Plumbing and Gas	Plumbing Inspector	905	1810	70
Electrical	Electric Inspector	1531	7000	1500

* Of these, 967 or 97.8% were corrected during 1965.

Appendix D

The Secretary of the Department of Housing and Urban Development is required by section 101 (a) of Title I of the Housing Act of 1949, 48 Stat. 1246, as amended, 42 U.S.C. § 1701 *et seq.*, to

"give consideration to the extent to which appropriate local public bodies have undertaken positive programs (through the adoption, modernization, administration and enforcement of housing, zoning, building, and other local laws, codes and regulations relating to land use and adequate standards of health, sanitation, and safety for buildings, including the use and occupancy of dwellings) for (1) preventing the spread or recurrence in the community of slums and blighted areas. . ."

Section 101 (c) makes the existence of a "workable program" for community improvement a condition precedent to any loan and grant contract, and the same section makes the existence and enforcement of adequate codes essential parts of a workable program:

"[N]o workable program shall be certified or recertified unless (a) the locality has had in effect, for at least six months prior to such certification or recertification, a minimum standards housing code, related but not limited to health, sanitation, and occupancy requirements, which is deemed adequate by the Secretary and (b) the Secretary is satisfied that the locality is carrying out an effective program of enforcement to achieve compliance with such housing code."

The national policy which stresses local code enforcement and rehabilitation is emphasized and re-emphasized in the definitions of purposes to which Title I funds may be devoted. For example, section 110 (c) of Title I includes among the "undertakings and activities" which may comprise an urban renewal project

"(5) carrying out plans for programs of code enforcement or voluntary repair and rehabilitation of buildings or other improvements in accordance with the urban renewal plan";

section 115 of Title I authorizes "rehabilitation grants" directly to individuals or families

"for the purpose of covering the cost of repairs and improvements necessary to make such [individual or family's] structure conform to public standards for decent, safe, and sanitary housing as required by applicable codes or other requirements of the urban renewal plan for the area"; and

section 117 of Title I provides for "code enforcement" grants to municipalities

"for the purpose of assisting such localities in carrying out programs of concentrated code enforcement in deteriorated or deteriorating areas. . ."

Finally, section 110 (c) evidences the national policy of maximizing the use of code enforcement and rehabilitation by requiring a special finding and also earmarking a substantial portion of the available money:

"Notwithstanding any other provision of this title, (a) no contract shall be entered into for any loan

or capital grant under this title for any project which provides for demolition and removal of buildings and improvements unless the Administrator determines that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area, and (b) not less than 10 per centum of the aggregate amount of (i) grants authorized to be contracted for under this title by the Housing and Urban Development Act of 1965 and subsequent Acts, and (ii) loans authorized to be made under section 312 of the Housing Act of 1964, shall be available for projects assisted with such grants or loans which involve primarily code enforcement and rehabilitation."

The Massachusetts urban renewal statutes are in accord. Section 26WW of the Housing Authority Law (chapter 121 of the Massachusetts General Laws (Ter. Ed.)) provides in part as follows:

"It is hereby declared (a) that there exist in certain cities and towns in this commonwealth substandard, decadent or blighted open areas which constitute a serious and growing menace, injurious to the public health, safety, morals and welfare of the residents of the commonwealth, . . . (b) that, while certain of such areas, or portions thereof, may require acquisition and clearance because the state of deterioration may make impracticable the reclamation of such areas or portions by conservation or rehabilitation, others of such areas, or portions thereof, are in such condition that they may, through the means provided in sections twenty-six XX to twenty-six BBB, inclusive, be conserved or rehabilitated in such a manner that the conditions and evils hereinbefore enumerated may be alleviated or eliminated. . . ."

Thus section 26 YY of the Housing Authority Law defines "rehabilitation or conservation work" as including "the restoration and renewal of a substandard, decadent or blighted open area, or portion thereof, in accordance with an urban renewal plan by (1) carrying out plans for a program of voluntary repair and rehabilitation of buildings or other improvements. . . ." An "urban renewal plan", as described in section 26 ZZ of the Housing Authority Law, may include rehabilitation. And by section 26AAA of the Housing Authority Law a redevelopment authority is "specifically authorized to make (i) plans for carrying out a program of voluntary repair and rehabilitation of buildings and improvements, and (ii) plans for the enforcement of laws, codes and regulations relating to . . . the compulsory repair, rehabilitation, demolition or removal of buildings and improvements."

SUPREME COURT OF THE UNITED STATES

No. 92.—OCTOBER TERM, 1966.

Roland Camara, Appellant, v. Municipal Court of the City and County of San Francisco.	}	On Appeal From the Dis- trict Court of Appeal of California, First Appel- late District.
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[June 5, 1967.]

MR. JUSTICE WHITE delivered the opinion of the Court.

In *Frank v. Maryland*, 359 U. S. 360, this Court upheld, by a five-to-four vote, a state court conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect her premises without a search warrant. In *Ohio ex rel. Eaton v. Price*, 364 U. S. 263, a similar conviction was affirmed by an equally divided Court. Since those closely divided decisions, more intensive efforts at all levels of government to contain and eliminate urban blight have led to increasing use of such inspection techniques, while numerous decisions of this Court have more fully defined the Fourth Amendment's effect on state and municipal action. *E. g.*, *Mapp v. Ohio*, 367 U. S. 643; *Ker v. California*, 374 U. S. 23. In view of the growing nationwide importance of the problem, we noted probable jurisdiction in this case and in *See v. City of Seattle*, *post*, to re-examine whether administrative inspection programs, as presently authorized and conducted, violate Fourth Amendment rights as those rights are enforced against the States through the Fourteenth Amendment. 385 U. S. 808.

Appellant brought this action in a California Superior Court alleging that he was awaiting trial on a criminal charge of violating the San Francisco Housing Code by refusing to permit a warrantless inspection of his resi-

dence, and that a writ of prohibition should issue to the criminal court because the ordinance authorizing such inspections is unconstitutional on its face. The Superior Court denied the writ, the District Court of Appeal affirmed, and the Supreme Court of California denied a petition for hearing. Appellant properly raised and had considered by the California courts the federal constitutional questions he now presents to this Court.

Though there were no judicial findings of fact in this prohibition proceeding, we shall set forth the parties' factual allegations. On November 6, 1963, an inspector of the Division of Housing Inspection of the San Francisco Department of Public Health entered an apartment building to make a routine annual inspection for possible violations of the city's Housing Code.¹ The building's manager informed the inspector that appellant, lessee of the ground floor, was using the rear of his leasehold as a personal residence. Claiming that the building's occupancy permit did not allow residential use of the ground floor, the inspector confronted appellant and demanded that he permit an inspection of the premises. Appellant refused to allow the inspection because the inspector lacked a search warrant.

The inspector returned on November 8, again without a warrant, and appellant again refused to allow an inspection. A citation was then mailed ordering appellant to appear at the district attorney's office. When appellant failed to appear, two inspectors returned to his apartment

¹ The inspection was conducted pursuant to § 86 (3) of the San Francisco Municipal Code, which provides that apartment house operators shall pay an annual license fee in part to defray the cost of periodic inspections of their buildings. The inspections are to be made by the Bureau of Housing Inspection "at least once a year and as often thereafter as may be deemed necessary." The permit of occupancy, which prescribes the apartment units which a building may contain, is not issued until the license is obtained.

on November 22. They informed appellant that he was required by law to permit an inspection under § 503 of the Housing Code:

"Sec. 503 RIGHT TO ENTER BUILDING. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

Appellant nevertheless refused the inspectors access to his apartment without a search warrant. Thereafter, a complaint was filed charging him with refusing to permit a lawful inspection in violation of § 507 of the Code.² Appellant was arrested on December 2 and released on bail. When his demurrer to the criminal complaint was denied, appellant filed this petition for a writ of prohibition.

Appellant has argued throughout this litigation that § 503 is contrary to the Fourth and Fourteenth Amendments in that it authorizes municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the

² "SEC. 507 PENALTY FOR VIOLATION. Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code, or any order of the Superintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment, not exceeding six (6) months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue."

Housing Code exists therein. Consequently, appellant contends, he may not be prosecuted under § 507 for refusing to permit an inspection unconstitutionally authorized by § 503. Relying on *Frank v. Maryland*, *Eaton v. Price*, and decisions in other States,³ the District Court of Appeal held that § 503 does not violate Fourth Amendment rights because it "is part of a regulatory scheme which is essentially civil rather than criminal in nature, inasmuch as that section creates a right of inspection which is limited in scope and may not be exercised under unreasonable conditions." Having concluded that *Frank v. Maryland*, to the extent that it sanctioned such warrantless inspections, must be overruled, we reverse.

I.

The Fourth Amendment provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which "is basic to a free society." *Wolf v. Colorado*, 338 U. S. 25, 27. As such, the Fourth Amendment is enforceable against

³ *Givner v. State*, 210 Md. 484, 124 A. 2d 764 (1956); *City of St. Louis v. Evans*, 337 S. W. 2d 948 (Mo. 1960); *Ohio ex rel. Eaton v. Price*, 168 Ohio St. 123, 151 N. E. 2d 523 (1958), aff'd by an equally divided Court, 364 U. S. 263 (1960). See also *State v. Rees*, 139 N. W. 2d 406 (Iowa 1966); *Commonwealth v. Hadley*, 1966 Mass. Adv. Sheets 1359, 222 N. E. 2d 681 (1966), appeal docketed Jan. 5, 1967, No. 1179 Misc., O. T. 1966; *People v. LaVerne*, 14 N. Y. 2d 304, 200 N. E. 2d 441 (1964).

the States through the Fourteenth Amendment. *Ker v. California*, 374 U. S. 23, 30.

Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against "unreasonable searches and seizures" into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court. Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. See, e. g., *Stoner v. California*, 376 U. S. 483; *United States v. Jeffers*, 342 U. S. 48; *McDonald v. United States*, 335 U. S. 451; *Agnello v. United States*, 269 U. S. 20. As the Court explained in *Johnson v. United States*, 333 U. S. 10, 14:

"The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

In *Frank v. Maryland*, this Court upheld the conviction of one who refused to permit a warrantless inspection of private premises for the purposes of locating and abating a suspected public nuisance. Although *Frank* can arguably be distinguished from these cases on its facts,⁴ the *Frank* opinion has generally been interpreted

⁴In *Frank*, the Baltimore ordinance required that the health inspector "have cause to suspect that a nuisance exists in any house, cellar or enclosure" before he could demand entry without a warrant, a requirement obviously met in *Frank* because the inspector observed

as carving out an additional exception to the rule that warrantless searches are unreasonable under the Fourth Amendment. See *Eaton v. Price*, *supra*. The District Court of Appeal so interpreted *Frank* in this case, and that ruling is the core of appellant's challenge here. We proceed to a re-examination of the factors which persuaded the *Frank* majority to adopt this construction of the Fourth Amendment's prohibition against unreasonable searches.

To the *Frank* majority, municipal fire, health, and housing inspection programs "touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusions," 359 U. S., at 367, because the inspections are merely to determine whether physical conditions exist which do not comply with minimum standards prescribed in local regulatory ordinances. Since the inspector does not ask that the property owner open his doors to a search for "evidence of criminal action" which may be used to secure the owner's criminal conviction, historic interests of "self-protection" jointly protected by the Fourth and Fifth Amendments⁵ are said not to be involved, but only the less intense "right to be secure from intrusion into personal privacy." *Id.*, at 365.

We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. For this reason alone, *Frank* differed from the great bulk of Fourth Amendment cases

extreme structural decay and a pile of rodent feces on the appellant's premises. Section 503 of the San Francisco Housing Code has no such "cause" requirement, but neither did the Ohio ordinance at issue in *Eaton v. Price*, a case which four Justices thought was controlled by *Frank*. 364 U. S., at 264, 265, n. 2 (opinion of Mr. Justice Brennan).

⁵ See *Boyd v. United States*, 116 U. S. 616. Compare *Schmerber v. California*, 384 U. S. 757, 766-772.

which have been considered by this Court." But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.⁶ For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security. And even accepting Frank's rather remarkable premise, inspections of the kind we are here considering do in fact jeopardize "self protection" interests of the property owner. Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint.⁷ Even in cities where discovery of a violation produces only an administrative compliance order,⁸ refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, again without a warrant.⁹ Finally, as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even, by jail sentence.

The *Frank* majority suggested, and appellee reasserts, two other justifications for permitting administrative health and safety inspections without a warrant. First,

⁶ See *Abel v. United States*, 362 U. S. 217, 254-256 (Mr. Justice BRENNAN, dissenting); *District of Columbia v. Little*, 85 U. S. App. D. C. 242, 178 F. 2d 13 (C. A. D. C. Cir.), aff'd, 339 U. S. 1.

⁷ See New York, N. Y., Administrative Code § D26-8.0 (1964).

⁸ See Washington, D. C., Housing Regulations § 2104 (1962).

⁹ This is the more prevalent enforcement procedure. See Note, Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 813-816.

it is argued that these inspections are "designed to make the least possible demand on the individual occupant." 359 U. S., at 367. The ordinances authorizing inspections are hedged with safeguards, and at any rate the inspector's particular decision to enter must comply with the constitutional standard of reasonableness even if he may enter without a warrant.¹⁰ In addition, the argument proceeds, the warrant process could not function effectively in this field. The decision to inspect an entire municipal area is based upon legislative or administrative assessment of broad factors such as the area's age and condition. Unless the magistrate is to review such policy matters, he must issue a "rubber stamp" warrant which provides no protection at all to the property owner.

In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. Yet, only by refusing entry and risking a criminal conviction can the occupant at

¹⁰ The San Francisco Code requires that the inspector display proper credentials, that he inspect "at reasonable times," and that he not obtain entry by force, at least when there is no emergency. The Baltimore ordinance in *Frank* required that the inspector "have cause to suspect that a nuisance exists." Some cities notify residents in advance, by mail or posted notice, of impending area inspections. State courts upholding these inspections without warrants have imposed a general reasonableness requirement. See cases cited, note 3, *supra*.

present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. See cases cited, p. 5, *supra*. We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.

The final justification suggested for warrantless administrative searches is that the public interest demands such a rule: it is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures. Of course, in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration. But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. For example, to say that gambling raids may not be made at the discretion of the police without a warrant is not necessarily to say that gambling raids may never be made. In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not

whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. See *Schmerber v. California*, 384 U. S. 757, 770-771. It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive.

In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections. Because of the nature of the municipal programs under consideration, however, these conclusions must be the beginning, not the end of our inquiry. The *Frank* majority gave recognition to the unique character of these inspection programs by refusing to require search warrants; to reject that disposition does not justify ignoring the question whether some other accommodation between public need and individual rights is essential.

II.

The Fourth Amendment provides that, "no Warrants shall issue but upon probable cause." Borrowing from more typical Fourth Amendment cases, appellant argues not only that code enforcement inspection programs must be circumscribed by a warrant procedure, but also that

warrants should issue only when the inspector possesses probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced. We disagree.

In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen. For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. Because fires and epidemics may ravage large urban areas, because unsightly conditions adversely affect the economic values of neighboring structures, numerous courts have upheld the police power of municipalities to impose and enforce such minimum standards even upon existing structures.¹¹ In determin-

¹¹ See *Abbate Bros. v. City of Chicago*, 11 Ill. 2d 337, 142 N. E. 2d 691; *City of Louisville v. Thompson*, 339 S. W. 2d 869 (Ky.); *Adamec v. Post*, 273 N. Y. 250, 7 N. E. 2d 120; *Paquette v. City*

ing whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.

There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures.¹² It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building. Appellee contends that, if the probable cause standard urged by appellant is adopted, the area inspection will be eliminated as a means of seeking compliance with code standards and the reasonable goals of code enforcement will be dealt a crushing blow.

of Fall River, 338 Mass. 368, 155 N. E. 2d 775; *Richards v. City of Columbia*, 227 S. C. 538, 88 S. E. 2d 683; *Boden v. City of Milwaukee*, 8 Wis. 2d 318, 99 N. W. 2d 156.

¹² See Osgood & Zwerner, *Rehabilitation and Conservation*, 25 *Law & Contemp. Prob.* 705, 718 and n. 43; Schwartz, *Crucial Areas in Administrative Law*, 34 *Geo. Wash. L. Rev.* 401, 423 and n. 93; Comment, *Rent Withholding and the Improvement of Substandard Housing*, 53 *Calif. L. Rev.* 304, 316-317; Note, *Enforcement of Municipal Housing Codes*, 78 *Harv. L. Rev.* 801, 807, 851; Note, *Municipal Housing Codes*, 69 *Harv. L. Rev.* 1115, 1124-1125. Section 311 (a) of the Housing and Urban Development Act of 1965, 42 U. S. C. § 1468 (1965 Supp.), authorizes grants of federal funds "to cities, other municipalities, and counties for the purpose of assisting such localities in carrying out programs of concentrated code enforcement in deteriorated or deteriorating areas in which such enforcement, together with those public improvements to be provided by the locality, may be expected to arrest the decline of the area."

In meeting this contention, appellant argues first, that his probable cause standard would not jeopardize area inspection programs because only a minute portion of the population will refuse to consent to such inspections, and second, that individual privacy in any event should be given preference to the public interest in conducting such inspections. The first argument, even if true, is irrelevant to the question whether the area inspection is reasonable within the meaning of the Fourth Amendment. The second argument is in effect an assertion that the area inspection is an unreasonable search. Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. But we think that a number of persuasive factors combine to support the reasonableness of code enforcement area inspections. First, such programs have a long history of judicial and public acceptance. See *Frank v. Maryland*, 359 U. S., at 367-371. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexperienced occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy. Both the majority and the dissent in *Frank* emphatically supported this conclusion:

"Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket

requirement of the safeguards necessary for a search of evidence of criminal acts. The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few. Certainly, the nature of our society has not vitiated the need for inspections first thought necessary 158 years ago, nor has experience revealed any abuse or inroad on freedom in meeting this need by means that history and dominant public opinion have sanctioned." 359 U. S., at 372.

"This is not to suggest that a health official need show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought." 359 U. S., at 383 (MR. JUSTICE DOUGLAS, dissenting).

Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, it is obvious that "probable cause" to issue a warrant to inspect must exist if reason-

able legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e. g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a "synthetic search warrant" and thereby to lessen the overall protections of the Fourth Amendment. *Frank v. Maryland*, 359 U. S., at 373. But we do not agree. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Cf. *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy. See *Eaton v. Price*, 364 U. S., at 273-274 (opinion of Mr. Justice Brennan).

III.

Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. See *North American Cold Storage Co. v. City*

of *Chicago*, 211 U. S. 306 (seizure of unwholesome food); *Jacobson v. Massachusetts*, 197 U. S. 11 (compulsory smallpox vaccination); *Compagnie Francaise v. Board of Health*, 186 U. S. 380 (health quarantine); *Kroplin v. Truax*, 119 Ohio St. 610, 165 N. E. 498 (summary destruction of tubercular cattle). On the other hand, in the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day. Moreover, most citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry. Similarly, the requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect.

IV.

In this case, appellant has been charged with a crime for his refusal to permit housing inspectors to enter his leasehold without a warrant. There was no emergency demanding immediate access; in fact, the inspectors made three trips to the building in an attempt to obtain appellant's consent to search. Yet no warrant was obtained and thus appellant was unable to verify either the need for or the appropriate limits of the inspection. No doubt, the inspectors entered the public portion of the building with the consent of the landlord, through the building's manager, but appellee does not contend that such consent was sufficient to authorize inspection of appellant's premises. Cf. *Stoner v. California*, *supra*; *Chapman v. United States*, 365 U. S. 610; *McDonald v. United States*, *supra*.

Assuming the facts to be as the parties have alleged, we therefore conclude that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection. It appears from the opinion of the District Court of Appeals that under these circumstances a writ of prohibition will issue to the criminal court under California law.

The judgment is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.